Supreme Court, U.S.
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No.

In the Supreme Court of the United States

STATE OF TEXAS, *ET AL.*,
Petitioners,

v.

MARJORIE MEYERS, *ET AL.*;
UNITED STATES OF AMERICA,
Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Lapides v. Board of Regents of the University System of Georgia*, 535 U.S. 613 (2002), the Court held that, when a State removes to federal court a claim for which it has waived its sovereign immunity in state courts, the State cannot then invoke the Eleventh Amendment to avoid suit. The Court expressly reserved the question whether a State still possesses immunity from suit when it removes claims for which the State's sovereign immunity has *not* been waived by the State or abrogated by Congress. Is *Lapides*'s waiver-by-removal rule limited to state-law claims for which the State has waived its sovereign immunity in state court, as the Fourth, Seventh, and District of Columbia Circuits have held, or does *Lapides*'s waiver-by-removal rule extend to all claims generally, as the Fifth, Ninth, and Tenth Circuits have held?

PARTIES TO THE PROCEEDING

Petitioners are the State of Texas, the Texas Department of Transportation, and Michael W. Behrens, successor to William G. Burnett as Executive Director of the Texas Department of Transportation.

Respondents are Marjorie Meyers (by next friend Edgar C. Benzing), Helen Elkin, Ruth H. Davis, and Phillip Greenberg, on behalf of themselves and all others similarly situated, and the United States of America.

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PETITION FOR WRIT OF CERTIORARI

This case provides an ideal vehicle for the Court to answer a significant question that it reserved in *Lapides v. Board of Regents of the University System of Georgia*, 535 U.S. 613 (2002): whether the waiver-by-removal rule announced in that case applies only to state-law claims for which the State has waived its immunity from suit in state court or, instead, extends to any federal or state claim. The six circuits that have addressed this question are evenly divided. And, given that there are only two possible answers to the question, further percolation in the circuits will not advance development of the issue. Meanwhile, States in circuits that have not addressed the issue cannot know whether removal of a case will deprive them of a dispositive defense, and thus cannot make informed litigation decisions. The Court should grant certiorari to resolve the circuit conflict and bring certainty to this area of law.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-35) is reported at 410 F.3d 236 (CA5 2005). The order of the court of appeals denying the petition for panel rehearing and rehearing en banc (Pet. App. 49-51) is reported at 454 F.3d 503 (CA5 2006). The district court's orders dismissing the suit (Pet. App. 36-43) and denying Meyers's motion to alter or amend the judgment (Pet. App. 44-48) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 19, 2005. Pet. App. 1. The order of the court of appeals denying the petition for panel rehearing and rehearing en banc was entered on June 29, 2006. *Id.*, at 49. Petitioners invoke the Court's jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Eleventh Amendment to the United States Constitution provides:

> "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. amend. XI.

STATEMENT

The underlying suit challenges Texas's five-dollar fee for disabled-parking placards as violating a regulation implementing Title II of the Americans with Disabilities Act (ADA). The State contended, and the district court agreed, that Title II is not a valid abrogation of the State's sovereign immunity as applied to this suit. The court of appeals held, however, that it was unnecessary to reach this issue because the State had waived its immunity from suit when

it removed this case to federal court. In so holding, the court of appeals joined two other circuits in extending the waiver-by-removal rule announced in *Lapides* to all claims—not just state-law claims for which a State has already waived its immunity in state court. Three other circuits have limited *Lapides* to this latter set of claims. The Court should grant certiorari to resolve this circuit conflict and bring uniformity to an issue of great importance to the States.

1. Texas law provides two means of access to parking spaces for persons with physical disabilities: specialty license plates and parking placards. TEX. TRANSP. CODE §§504.201, 681.002. Unlike the license plates, the placards are not permanently attached to a vehicle, but hang "on the rearview mirror of the vehicle's front windshield." *Id.*, §681.006(a)(2)(B). A placard, unlike a license plate, allows a person with a disability to access reserved parking spaces when he is driving a vehicle other than his own or is being driven in a vehicle with no specialty license plate.

Texas law prescribes unique design specifications for placards, including "a hologram designed to prevent the reproduction of the placard or the production of a counterfeit placard." *Id.*, §681.002. Although the State charges the same amount for both specialty license plates and standard license plates, *see id.*, §504.201, it charges five dollars for a placard, *see id.*, §681.003(b)(3), "to defray the cost of providing the . . . placard," *id.*, §681.005(1).

2. Respondents Meyers, Elkin, Davis, and Greenberg (collectively, "Meyers") filed this class action in state court against the State of Texas, the Texas Department of Transportation, and the Department's Executive Director (collectively, "the State"). Pet. App. 2. Meyers alleges that Texas's five-dollar fee for disabled-parking placards violates 28 C.F.R. §35.130(f)—a regulation under Title II of the ADA, 42 U.S.C. §§12131-12165—and seeks declaratory relief, injunctive relief, monetary damages, costs, and attorneys' fees. Pet. App. 3-4, 37. The State removed the case to

federal court and moved to dismiss based on its sovereign immunity from suit. *Id.*, at 4.[1]

Meyers argued that the State had waived its immunity from suit by removing the case to federal court and, regardless, that Title II of the ADA abrogated the State's immunity. *Id.*, at 39-40. The district court rejected Meyers's arguments and dismissed the suit, holding that the State did not waive its immunity from suit by removing the case and that Title II was not a valid abrogation of the State's immunity as applied to Meyers's claims. *Id.*, at 39-41. Meyers filed a motion for reconsideration, which the district court denied. *Id.*, at 44-48. Meyers appealed. *Id.*, at 4.

3. The court of appeals reversed and remanded on the sole ground that, under *Lapides*, the State had waived its immunity from suit by removing the case to federal court. *Id.*, at 32, 34. Acknowledging that the Court had limited its holding in *Lapides* to the removal of state-law claims for which the State had waived its immunity in state court, *id.*, at 8, the court of appeals nevertheless concluded that *Lapides*'s waiver-by-removal rule should extend to *all* claims:

> "[W]e believe that *Lapides*'s interpretation of the voluntary invocation principle, as including the waiver-by-removal rule, applies generally to *any* private suit which a state removes to federal court. There is no evident basis in law or judicial administration for severely limiting those general

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1. The State had previously removed the case, but the district court remanded, determining that the Tax Injunction Act barred federal jurisdiction over the suit. Pet. App. 4. Subsequently, the court of appeals lifted that jurisdictional bar in *Neinast v. Texas*, 217 F.3d 275, 279 (CA5 2000), in which it held that the Tax Injunction Act was inapplicable to a placard-fee suit like this one. Pet. App. 4. In light of this new precedent, the State once again removed the case. *Id.* Meyers then filed a motion to remand, which the district court denied. *Id.*, at 37-38, 41.

> principles . . . to a small sub-set of federal cases including only state-law claims in respect to which a state has waived immunity therefrom in state court." *Id.*, at 9 (emphasis added).

The court of appeals explained that this extension of *Lapides* to all claims was necessary "to eliminate the *potential* of unfairness by the enforcement of clear jurisdictional rules having genuine preventive effect," regardless of whether the State actually achieves any unfair advantage by removing a case containing federal or state claims for which its immunity has not been waived or abrogated. *Id.*, at 23.

In so holding, the court of appeals noted that it was joining the Ninth and Tenth Circuits in extending *Lapides*'s waiver-by-removal rule to federal-law claims. *Id.*, at 18 (citing *Embury v. King*, 361 F.3d 562, 564 (CA9 2004), and *Estes v. Wyo. Dep't of Transp.*, 302 F.3d 1200, 1206 (CA10 2002)). The court also expressly disagreed with the Fourth Circuit's decision in *Stewart v. North Carolina*, 393 F.3d 484 (CA4 2005), which had limited *Lapides* to state-law claims for which a State has already waived immunity from suit in state court. Pet. App. 20-22.

The court of appeals rejected the State's argument that removal of the case waived only the State's "forum immunity"—*i.e.*, its immunity from litigating in federal court—but did not waive the State's underlying sovereign immunity from Meyers's suit. *Id.*, at 23-28. The court reasoned that the State's immunity from suit was an indivisible whole that the State had waived entirely by removing the case. *See id.*, at 25-26.[2] Having held that the State waived its

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2. In *dicta*, the court of appeals suggested that, after removal, a State would retain any immunity *from liability* afforded by state law, Pet. App. 28-32, but it did not explain how any such state-law principle could apply to defeat Meyers's federal ADA claim in federal court in light of the *Erie* doctrine and the Supremacy Clause.

immunity from suit, the court noted that it was unnecessary to review the district court's decision that Congress did not validly abrogate this immunity in Title II of the ADA. *Id.*, at 33.

The court of appeals denied rehearing and rehearing en banc. *Id.*, at 50.[3]

REASONS FOR GRANTING THE PETITION

The circuits are divided on the question that the Court reserved in *Lapides*: whether the waiver-by-removal rule applies to claims for which the State contends that its sovereign immunity from suit has neither been waived nor validly abrogated.

The conflict is clear and deep. The Fourth, Seventh, and District of Columbia Circuits have all limited *Lapides*'s waiver-by-removal rule to state-law claims for which the State has waived its immunity in state court. For all other claims, in those circuits, a State's removal of a case waives only its forum immunity—its privilege not to litigate in federal court—but not any underlying sovereign immunity from suit it may have. By contrast, the Fifth,

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3. In a short opinion accompanying this order, the court of appeals reiterated its *dicta* that the State could assert any immunity from liability it had under Texas law to defeat Meyers's Title II claims on the merits, but, again, it did not explain how state law might apply to those claims. Pet. App. 50. The court also restated that it had not reached the issue of whether Title II of the ADA validly abrogates the State's sovereign immunity. *Id.* The court then listed the abrogation issue among those that it was remanding "for further proceedings." *Id.* But there are no further proceedings to be had on the abrogation issue, given that (1) the court of appeals held that the State did not have any immunity to be abrogated, having already waived that immunity by removing the case, and (2) in any event, the district court has already held—twice—that Title II did not validly abrogate the State's sovereign immunity as applied to this suit, *id.*, at 40, 46-47, and Meyers had specifically challenged that decision in her appeal, Resp. C.A. Br. 43-44.

Ninth, and Tenth Circuits have extended *Lapides*'s waiver-by-removal rule to all claims, holding that a State's removal waives its immunity from suit *in toto*—*i.e.*, its forum immunity plus the entirety of its underlying sovereign immunity. Because six circuits have now taken sides in a debate that has only two possible answers, no further percolation is needed in the lower courts. The question is already fully developed and ripe for the Court's resolution.

The consequences of this debate for the States are significant. The eighteen States in the circuits that have extended *Lapides*'s waiver-by-removal rule to all claims unfairly face a Hobson's choice between relinquishing their underlying sovereign immunity and foregoing a federal forum while States in those circuits that have limited *Lapides* are not burdened by this dilemma. And the uncertainty that prevails in the circuits that have not addressed this question prejudices the twenty-four States in those jurisdictions as well. When these States are sued in state court for alleged violations of federal law and have a substantial claim of immunity, they cannot make an informed decision about removal. They can remain in state court and forego federal-court adjudication of important questions of federal law, or they can remove and risk the loss of a potentially case-determinative defense. The quandary for all States is only compounded when cases include multiple divergent claims and individual state-employee defendants whose interests must be factored into the decision whether to remove. The Court should resolve this question so that all States stand on equal footing when it comes to removal and can make these important litigation decisions fully cognizant of the repercussions.

Finally, the extension of *Lapides*'s waiver-by-removal rule is unfounded. Although removal understandably waives a State's objection to litigating in federal court, it should not deprive a State of the right to assert a defense of underlying sovereign immunity when the State could have asserted the defense in state court. The

United States urged this precise position in *Lapides* itself, explaining that a State's "removal of a case effects a waiver of its immunity from suit in a federal forum" but does not "waive any defenses that would have been available to the State in state court," such as "[t]he constitutional right not to be sued at all." Brief for the United States as Amicus Curiae at 22, *Lapides v. Bd. of Regents of the Univ. Sys. of Ga.*, 535 U.S. 613 (2002) (No. 01-298), 2001 WL 1673411, at *22.

The Court's decision in *Lapides* sensibly prevents a State from regaining by removal an immunity it never had in state court. But the Fifth Circuit's decision skews the balance achieved in *Lapides* to the opposite extreme, putting the States at a substantive disadvantage when they choose a federal forum. The Court should grant certiorari to vindicate the principle animating *Lapides*: that the procedural device of removal should be neutral as to the substance of the claims, conferring no substantive advantages or disadvantages *vis à vis* the state courts.

I. THE CIRCUITS DISAGREE OVER THE PROPER SCOPE OF *LAPIDES*'S WAIVER-BY-REMOVAL RULE.

As the Fifth Circuit, other courts, and commentators have all acknowledged, the circuits are split over the question expressly reserved by the Court in *Lapides*: whether a State waives its immunity from suit by removing a federal or state claim as to which its underlying sovereign immunity has not already been waived or abrogated. *See, e.g.*, Pet. App. 20-22 (disagreeing with Fourth Circuit's refusal to extend *Lapides* to all claims); *Boone v. Pa. Office of Vocational Rehab.*, 373 F. Supp. 2d 484, 492 (M.D. Pa. 2005) (observing that "the issues the Supreme Court did not decide in *Lapides* have generated much discussion in the federal courts of appeals" and cataloguing the divergent decisions); Steven H. Steinglass, *Removing § 1983 Actions to Federal Court*, *in* 1 SECTION 1983 LITIGATION IN STATE COURTS §24:9 n.8 (2006) (noting that "[i]t is unclear, however, how *Lapides* will apply to

federal claims and to state law claims on which states have not waived their sovereign (as contrasted to Eleventh Amendment) immunity" and citing *Stewart* and *Meyers* as exemplifying the confusion).

The Fourth, Seventh, and District of Columbia Circuits have limited *Lapides* to its specific holding that a State's removal of a case waives its immunity from suit for claims as to which the State has waived its underlying sovereign immunity in state court. *Stewart v. North Carolina*, 393 F.3d 484, 488-90 (CA4 2005); *Omosegbon v. Wells*, 335 F.3d 668, 673 (CA7 2003); *Watters v. Wash. Metro. Area Transit Auth.*, 295 F.3d 36, 42 n.13 (CADC 2002). The Fourth Circuit explained that the Court's focus in *Lapides* was "consistency, fairness, and preventing States from using the [Eleventh] Amendment 'to achieve unfair tactical advantages.'" *Stewart*, 393 F.3d, at 490 (quoting *Lapides*, 535 U.S., at 621). Toward that end, *Lapides*'s waiver-by-removal rule precludes a State from "regaining" immunity it had abandoned in state court by removing the case to federal court and invoking the Eleventh Amendment. *See id.* But where the State's underlying sovereign immunity has not been waived or abrogated, the Fourth Circuit discerned "nothing inconsistent, anomalous, or unfair about permitting [a State] to employ removal in the same manner as any other defendant facing federal claims." *Id.* Under these circumstances, the Fourth Circuit observed, the State is merely seeking "to have the sovereign immunity issue resolved by a federal court rather than a state court." *Id.*

Thus, the Seventh Circuit has recognized that "there is an extra layer to our sovereign immunity analysis" in removed cases. *Omosegbon*, 335 F.3d, at 673. In that circuit, *Lapides* is not controlling unless the court first determines that the State would not have been immune from suit in state court. *Id.* The District of Columbia Circuit has likewise declined to find a waiver of immunity under *Lapides* where the removing state defendants "have

not waived immunity . . . in their own courts." *Watters*, 295 F.3d, at 42 n.13.[4]

By contrast, the Fifth, Ninth, and Tenth Circuits have extended application of *Lapides*'s waiver-by-removal rule beyond claims for which a State has waived its sovereign immunity in state court. Pet. App. 9; *Embury v. King*, 361 F.3d 562, 564 (CA9 2004); *Estes v. Wyo. Dep't of Transp.*, 302 F.3d 1200, 1203-06 (CA10 2002). In this case, the Fifth Circuit explained that the rule "applies generally to any private suit which a state removes to federal court" and is not limited "to a small sub-set of federal cases including only state-law claims in respect to which a state has waived immunity therefrom in state court." Pet. App. 9. In the Fifth Circuit's view, this blanket application of the rule is needed "to eliminate the *potential* of unfairness," regardless of whether a State actually achieves any unfair advantage by removing a federal or state claim for which its immunity has not been waived or abrogated. *Id.*, at 23.

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4. In this case, the Fifth Circuit erroneously described these decisions from the Seventh and District of Columbia Circuits as inapposite. Pet. App. 19 n.14, 20. The court asserted that, in *Omosegbon*, the Seventh Circuit never "indicated that it would reach a different result if the state had not waived immunity in state courts or if the case had also involved federal-law claims." *Id.*, at 20. Not so. In fact, the Seventh Circuit explicitly stated: "*Before* we find the rule announced in *Lapides* to be controlling here, we *must first* satisfy ourselves that Indiana's state-law immunity rules would have allowed an Indiana court to hear Dele's state-law contract claim had this lawsuit not been removed to federal court." 335 F.3d, at 673 (emphases added). The court of appeals also believed that the District of Columbia Circuit's "remarks about waiver by removal" in *Watters* "were not relevant to its decision." Pet. App. 19 n.14. To the contrary, the *Watters* court felt compelled to address the waiver-by-removal issue *sua sponte* because *Lapides* was handed down while the case was pending. 295 F.3d, at 42 n.13.

In this regard, the Fifth Circuit noted that it was joining the Ninth and Tenth Circuits in extending *Lapides* to federal and state claims generally. *Id.*, at 18. The Ninth Circuit has held that "the rule in *Lapides* applies to federal claims as well as to state law claims," sharing the Fifth Circuit's assessment that "[n]othing in the reasoning of *Lapides* supports limiting the waiver . . . to state law claims only." *Embury*, 361 F.3d, at 564.[5] And the Tenth Circuit has also held that a State's removal of a federal-law claim waives its immunity from suit, even if the federal claim is otherwise an invalid abrogation of the State's immunity (*e.g.*, Title I of the ADA). *Estes*, 302 F.3d, at 1203-06. Thus, in these Circuits, the act of removal waives not only the State's "forum immunity," but also its underlying immunity from suit—an immunity it would have retained had the suit remained in state court or been originally filed in federal court.[6]

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5. Although the Ninth Circuit held that *Lapides*'s waiver-by-removal rule extends to federal-law claims generally, it reserved the question whether the rule would apply to federal claims predicated upon an invalid abrogation of the States' immunity—*e.g.*, the ADEA—because no such claims were presented in that case. *Embury*, 361 F.3d, at 566 n.20.

6. In an unpublished, non-precedential opinion, the Third Circuit has also held that *Lapides* extends to a State's removal of a federal-law claim. *Fidtler v. Pa. Dep't of Corr.*, 55 Fed. Appx. 33, 35 (CA3 2002). The issue is pending before the Third Circuit in another appeal. *Boone v. Pa. Office of Vocational Rehab.*, No. 06-3240 (CA3) (filed June 30, 2006). In that case, the district court held, contrary to *Fidtler*, that *Lapides* should not be extended beyond its holding, so that "whatever immunity a state enjoyed in state court remains with it after removal to federal court." *Boone*, 373 F. Supp. 2d, at 494.

II. THE COURT SHOULD GRANT CERTIORARI TO RESOLVE THIS CONFLICT.

The question presented is of great consequence to the States. The scope of the waiver effected by removal influences daily decisions by state attorneys whether to remove suits against the State that include federal claims but are brought in state court. If removal waives only the State's forum immunity from suit in federal court, then the State can exercise its right to removal without fear of waiving any underlying immunity from suit it may have enjoyed in state court. But if removal waives the State's immunity from suit in its entirety, then States must undertake a very careful and delicate balancing of their (and any co-defendants') desire for federal-court expertise against the loss of an important defense. *See* Part II.A., *infra*.

The two potential answers to this important question have already been thoroughly explored by six courts of appeals, making further percolation unnecessary. Moreover, the conflict among these circuits untenably puts States of equal dignity on different footing with respect to their immunity in the federal courts. And the uncertainty that prevails in the remaining circuits keeps almost half of the States in the dark about the consequences of removing a case with immunity defenses. For these reasons, the Court should grant the petition. *See* Part II.B., *infra*.

A. Whether Removal Waives the States' Underlying Sovereign Immunity from Suit—in Addition to Their Immunity from Suit in a Federal Forum—Is a Question of Fundamental Importance to the States.

1. The ability to remove federal-question cases is an important right for all defendants—including States—and furthers significant federal interests.

Like all other defendants, States have the right to remove federal-question cases. 28 U.S.C. §§1441(a), (b). One reason

defendants take advantage of that right is to avail themselves of the federal courts' expertise in resolving questions of federal law, which comports with why Congress enacted §1441. As the Court has observed:

> "The legislative history of the federal question removal provision is meager, but it has been suggested that its purpose was the same as original federal question jurisdiction, enacted at the same time in the Judiciary Act of 1875, namely, to protect federal rights and to provide a forum that could more accurately interpret federal law." *Boys Markets, Inc. v. Retail Clerks Union, Local 770*, 398 U.S. 235, 247 n.13 (1970) (internal citations omitted).

Through the removal statutes, "Congress thus expressed an unmistakable preference for a federal forum." *El Paso Natural Gas Co. v. Neztsosie*, 526 U.S. 473, 484-85 (1999) (considering removal pursuant to the Price-Anderson Act). And, particularly for questions of immunity, federal-court adjudication can be desirable. *Cf. Willingham v. Morgan*, 395 U.S. 402, 407 (1969) (in a case removed under 28 U.S.C. §1442, noting that "one of the most important reasons for removal is to have the validity of the defense of official immunity tried in a federal court").

Moreover, the determination of federal-law questions by courts with special expertise enhances the consistency of federal law, which the Court has recognized as a critical interest. *Michigan v. Long*, 463 U.S. 1032, 1040 (1983) ("[I]t cannot be doubted that there is an important need for uniformity in federal law . . . .").

Finally, removal facilitates the participation of the United States in the adjudication of important federal questions. When litigants challenge the validity or constitutionality of federal statutes and regulations in state court rather than federal court, there is no mechanism requiring notice to the Attorney General or Solicitor General. Thus, if defendants in those cases have a disincentive to

remove, it substantially increases the risk that the United States will not have a role in defending federal law from such challenges.

2. States cannot intelligently exercise their right to remove as long as the scope of the immunity waived by removal remains undecided.

States are frequently sued in state courts for alleged violations of federal law. Thus, they must regularly make the decision whether to remain in state court or remove to federal court.

But States in those circuits that have extended *Lapides*'s waiver-by-removal rule to all claims face a dilemma: forego the federal-law expertise offered by the federal forum or lose their defense of immunity from suit entirely. And the presence of multiple claims—some subject to a sovereign-immunity defense and some not—may greatly complicate the decision whether to remove. For example, a State that is defending claims of defamation under state law and violation of the family-leave provisions of the federal Family and Medical Leave Act (FMLA) would have to carefully weigh its desire for federal court expertise in the FMLA against the waiver of its underlying sovereign immunity from suit for the defamation claim that it may have enjoyed in state court, *see* TEX. CIV. PRAC. & REM. CODE §101.057 (providing, as a matter of state law, that the State's immunity from suit is not waived for intentional torts).

States in circuits that have not addressed the scope of *Lapides* likewise confront a difficult choice. When any claim in a case—whether a federal-law claim or a supplemental state-law claim—is subject to a defense of sovereign immunity, the State cannot know whether availing itself of the federal courts' expertise in federal law will result in the loss of its immunity from suit entirely. Only if these States knew whether they would in fact lose their underlying immunity from suit by removing could they make an intelligent, informed choice. Indeed, had Texas foreseen the decision below, it likely would not have removed this case, instead

surrendering the federal forum to which any other defendant would have been entitled.

The presence of individual state-employee defendants in a suit further complicates the decision whether to remove for all of these States, because such defendants often desire a federal forum for adjudication of their qualified-immunity defenses. Because, as a general rule, all defendants must consent to removal, *see Chicago, Rock Island, & Pac. Ry. Co. v. Martin*, 178 U.S. 245, 248 (1900), the State must undertake a careful balancing of the risks and benefits of removal for all defendants. Clarifying the precise scope of the risk to the important defense of sovereign immunity from suit would greatly decrease the guesswork and enable the States to make informed litigation decisions.

B. Further Development in the Courts of Appeals Is Unwarranted.

There are only two possible answers to the question presented. A State's removal of a case to federal court waives either (1) only its right not to be sued in a federal forum, or (2) that right plus its underlying sovereign immunity from suit (together comprising its immunity from suit *in toto*). In taking either side of this binary debate, six circuits have already thoroughly explored the question. *See* Part I, *supra*. Decisions by any additional circuits will join one side or the other but are unlikely to shed any further light on the substance of the controversy. The dispute is, therefore, fully developed and ready to be resolved.

Indeed, only the Court's intervention can resolve this conflict because the circuits' disagreement rests on fundamentally inconsistent interpretations of *Lapides*. The Fifth Circuit viewed *Lapides*'s reservation of other applications of the waiver-by-removal rule merely as the Court "circumspectly . . . not address[ing] any issue unnecessary to its decision," Pet. App. 9, and concluded that "the principles of voluntary invocation and waiver by removal as explained in *Lapides*" justified the extension of the

waiver-by-removal rule to all claims, *id.*, at 23. The Fourth Circuit likewise believed that "the principles animating *Lapides* shed light on the issue," but reached the opposite result from the Fifth Circuit. *Stewart*, 393 F.3d, at 489. The Fourth Circuit understood *Lapides*'s focus to be "consistency, fairness, and preventing States from using the [Eleventh] Amendment 'to achieve unfair tactical advantages.'" *Id.*, at 490 (quoting *Lapides*, 535 U.S., at 621). Finding no "risk of inconsistency and unfair tactical advantages" when a State removes a claim for which it is immune from suit in state court, the Fourth Circuit determined that "this case is very different from *Lapides*." *Id.* Whether the principles underlying *Lapides* mandate extension of the waiver-by-removal rule to all claims is ultimately a question that only the Court can answer.

C. Delay in Resolving This Issue Unduly Prejudices the States.

Uniformity in federal law is particularly important when, as here, the sovereign interests of all States are implicated. The Court has explained that, in our federal system, "immunity from private suits" is "central to [the] sovereign dignity" of the States. *Alden v. Maine*, 527 U.S. 706, 715 (1999). Another bedrock principle of our system is that "[t]he several states are of *equal* dignity." *Brown v. Fletcher's Estate*, 210 U.S. 82, 89 (1908) (emphasis added). The current conflict over the scope of *Lapides* undermines these precepts because, in six circuits, the States are *not* on equal footing with regard to removal's effect on the immunity from suit that inheres in their dignity as sovereigns. Certiorari is warranted to resolve this untenable disparity.

Moreover, any delay in finally resolving this question unduly prejudices the twenty-four States in the circuits that have not passed upon the issue. In the face of this Court's express reservation of the question and an even circuit split, these States simply cannot make an informed decision about removing a federal-question case that implicates sovereign-immunity defenses. *See* Part II.A.2, *supra*.

The Court should grant the petition to remove this uncertainty from a common litigation position.

III. THE COURT OF APPEALS'S EXTENSION OF *LAPIDES* IS NOT SUPPORTED BY THE COURT'S ELEVENTH-AMENDMENT PRECEDENT OR *LAPIDES*'S RATIONALE.

The court of appeals's conclusion that *Lapides*'s waiver-by-removal rule must be extended even to claims for which a State's underlying sovereign immunity has not been waived or abrogated rests on two erroneous precepts: (1) a State's immunity from litigating in a federal forum, recognized by the Eleventh Amendment, is indistinguishable from its inherent sovereign immunity from suit, and thus cannot be separately waived, *see* Pet. App. 23-28; and (2) failing to extend *Lapides* to this situation could produce the inconsistency and potential unfairness that the *Lapides* rule aims to avoid, *see id.*, at 21-23. Neither is correct.

A. A State's Immunity from Litigating in Federal Court—Recognized by the Eleventh Amendment—Is a Distinct Component of the State's Inherent Sovereign Immunity That May Be Separately Waived.

The court of appeals properly recognized that the different aspects of the State's immunity from suit—its immunity from private suits in general as well as its immunity from suit in federal court described by the Eleventh Amendment—inhere in the nation's structure and emanate from the States' sovereign status. *See* Pet. App. 25-26. However, from this principle the court of appeals drew an incorrect conclusion: that because these strands of the State's sovereign immunity have a single source, the State may not choose to waive one without the other. *See id.*, at 23-26. Thus, the court of appeals held that removal waives the State's immunity from suit in its entirety—rather than merely its immunity from litigating in the federal forum. *Id.* This conclusion was in error.

The Court has implicitly recognized that a State may waive the federal-forum component of its sovereign immunity without waiving its inherent sovereign immunity from suit *in toto*. In *Lapides* itself, the Court explicitly declined to consider "the scope of waiver by removal in a situation where the State's *underlying* sovereign immunity from suit has not been waived or abrogated in state court." 535 U.S., at 617-18 (emphasis added). Similarly, the Court was careful to describe its ruling as follows: "removal is a form of voluntary invocation of a federal court's jurisdiction sufficient to waive the State's otherwise valid objection to litigation of a matter (here of state law) in a federal *forum*." *Id.*, at 624 (emphasis added). Thus, the Court indicated that the waiver of immunity from suit "in a federal forum" is a concept distinct from the waiver of "underlying sovereign immunity from suit." *Id.*, at 618.

Likewise, in *Pennhurst State School & Hospital v. Halderman*, the Court observed that "[a] State's constitutional interest in immunity encompasses not merely *whether* it may be sued, but *where* it may be sued." 465 U.S. 89, 99 (1984). This distinction, the Court noted, is reflected in the fact that "the Court consistently has held that a State's waiver of sovereign immunity in its own courts is not a waiver of the Eleventh Amendment immunity in the federal courts." *Id.*, at 100 n.9 (citations omitted). In other words, a State's right not to be sued in federal court—the right described by the Eleventh Amendment—implicates only the "where" aspect of the State's immunity; it does not implicate the "whether" aspect of the State's immunity.

This is precisely the position taken by the United States as an *amicus curiae* in *Lapides*. In its brief, the United States described Eleventh Amendment immunity as including "forum immunity"—*i.e.*, immunity from proceeding in federal court. But the United States carefully distinguished this "forum immunity" from a State's underlying sovereign immunity from suit:

> "Although a State's removal of a case effects a waiver of its immunity from suit in a federal forum, there are significant limits on the scope of that waiver. The Eleventh Amendment incorporates two forms of immunity. A State may choose not to be sued at all, or it may choose to be sued, but only in its own courts. *Pennhurst II*, 465 U.S. at 99. A removal of a case to federal court waives only forum immunity. By voluntarily and affirmatively selecting a federal forum for litigation of a case, the State consents to have a federal court rather than the state court decide the case. The act of removal, however, cannot be understood to waive any defenses that would have been available to the State in state court. The constitutional right not to be sued at all is just such a defense." Brief for the United States as Amicus Curiae at 22, *Lapides v. Bd. of Regents of the Univ. Sys. of Ga.*, 535 U.S. 613 (2002) (No. 01-298), 2001 WL 1673411, at *22.

Accordingly, the United States explained that, "to the extent that the State would have a sovereign immunity defense to constitutional claims in state court, *see Alden v. Maine*, 527 U.S. 706 (1999), its removal of the case to federal court would not waive that defense." *Id.*, at 23, 2001 WL 1673411, at *23.[7]

Therefore, although the State's removal of this case necessarily waived any objection it had to proceeding in federal court, the removal should not have waived its "underlying sovereign immunity from suit." *Cf. Lapides*, 535 U.S., at 617-18. Thus, that

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7. The United States intervened in this case in the court of appeals, but, consistent with its position in *Lapides*, it did not support Meyers in urging the court of appeals to extend *Lapides* to this case. Rather, it limited its briefing and argument to the defense of the constitutionality of Title II of the ADA and its regulations, and expressed no position on the applicability of *Lapides*. *See* U.S. C.A. Br. 2.

defense to the Title II claims remained to be adjudicated by the district court, which in turn held that Congress, in enacting Title II, had not validly abrogated the State's sovereign immunity as applied to Meyers's suit. Pet. App. 40, 46-47.[8]

The court of appeals's own remand instructions on rehearing demonstrate the fallacy of its reasoning. That court remanded, *inter alia*, the issue "whether the ADA Title II on its face or as applied constitutionally abrogates the State's sovereign immunity," Pet. App. 50, inexplicably ignoring the fact that the district court had already ruled on this issue in the State's favor and that Meyers had appealed that ruling, *id.*, at 40, 46-47. Instead of reaching the issue that the district court resolved, the court of appeals held that the State had waived that defense of immunity from suit and suggested that the State retains only any state-law immunity from liability, *id.*, at 32—a concept of dubious applicability in this federal-question case in federal court.

B. Allowing the State to Assert Its Underlying Immunity from Suit After Removal Does Not Present the Concerns of Inconsistency and Unfairness That Animated *Lapides*.

Contrary to the court of appeals's analysis, allowing a State to assert its underlying sovereign immunity from suit after removing a case to federal court does not present any inconsistency or unfairness that justifies extending *Lapides* to this scenario. As the Fourth Circuit noted in *Stewart*, the unfairness in *Lapides* arose because the State had already chosen to waive its sovereign immunity from suit in state court but was attempting to "*regain* immunity by removing the case to federal court and invoking the Eleventh Amendment." 393 F.3d, at 488.

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8. The Eighth Circuit has agreed with the district court that Title II of the ADA does not validly abrogate the States' immunity from suit as applied to a challenge to parking-placard fees under 28 C.F.R. §35.130(f). *Klingler v. Dir., Dep't of Revenue*, 455 F.3d 888, 892-97 (CA8 2006).

By contrast, in this case and in *Stewart*, the State raised the defense that its sovereign immunity from suit had never been validly waived or abrogated at all. Pet. App. 37, 45; 393 F.3d, at 490. Removing the case did not create or enhance this defense; it simply meant that the defense would be resolved by a federal court instead of a state court—as would happen with any other defense raised by a removing defendant. Thus, as the Fourth Circuit observed, there is "nothing inconsistent, anomalous, or unfair about permitting [the State] to employ removal in the same manner as any other defendant facing federal claims." *Stewart*, 393 F.3d, at 490.[9]

In this circumstance, the State gained no substantive advantage by removal. Rather, the State sought only to maintain the *status*

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9. The Fifth Circuit suggested that the State's removal of this case unfairly enabled the State to obtain a second ruling on its sovereign-immunity defense. Pet. App. 22-23. But that is not the case. At the time of removal, the state trial court had already rejected that defense, and the State was actively pursuing an interlocutory appeal from that decision in state appellate court; after removal, the federal district court then dismissed the case on sovereign-immunity grounds. But again, this course of events is not due to any unique advantage the State has as a defendant or the fact that the issue at stake is an immunity defense. Rather, the case unfolded in this manner because (1) after the state court ruled on the State's immunity defense, the case became removable because of an intervening change in federal law, *see supra* at 4 n.1; and (2) it is well-settled that "[a]ny orders or rulings issued by the state court prior to removal are not conclusive in the federal action after removal." 14C CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE §3738 (3d ed. 2005); *see also Gen. Inv. Co. v. Lake Shore & Mich. S. Ry. Co.*, 260 U.S. 261, 267 (1922) (holding that interlocutory state court orders are subject to reconsideration by a district court after removal). This principle would have applied to any state-court decision rejecting any defense raised by any removing defendant.

quo ante—retaining exactly the same defenses that would have been available in state court. Indeed, the only unfair consequence following the court of appeals's decision is that now the State, unlike any other defendant, is effectively denied the federal statutory right of removal if it wants to assert a defense that would be exactly the same in state and federal court.

Such inconsistency and unfairness could be eliminated by adopting the Fourth Circuit's holding in *Stewart* and the United States' position in *Lapides*: that removal waives only a State's immunity from suit in a federal forum, but not its underlying sovereign immunity from suit. This principle guarantees that neither party gains a substantive advantage through removal. Moreover, it comports with the Court's call in *Lapides* for clear jurisdictional rules. *See* 535 U.S., at 621.

CONCLUSION

The Court should grant the petition for writ of certiorari.

Respectfully submitted,

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In the Supreme Court of the United States

STATE OF TEXAS, *ET AL.*,
Petitioners,
v.

MARJORIE MEYERS, *ET AL*;
UNITED STATES OF AMERICA,
Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

APPENDIX

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United States Court of Appeals
Fifth Circuit

FILED

May 19, 2005

Charles R. Fulbruge III
Clerk

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 02-50452

MARJORIE MEYERS, by Next Friend Edgar C. Benning, on behalf of herself and all others similarly situated; HELEN ELKIN, on behalf of herself and all others similarly situated; RUTH H. DAVIS, on behalf of herself and all others similarly situated; PHILLIP GREENBERG, on behalf of himself and all others similarly situated,

Plaintiffs-Appellants,

VERSUS

STATE OF TEXAS; TEXAS DEPARTMENT OF TRANSPORTATION; WILLIAM G. BURNETT, Executive Director of the Texas Department of Transportation,

Defendants-Appellees.

Appeal from the United States District Court
For the Western District of Texas, Austin Division

Before WIENER, BENAVIDES, and DENNIS, Circuit Judges.
DENNIS, Circuit Judge:

The named plaintiffs[1] originally brought this civil rights class action in Texas state court under Title II of the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101, et. seq., against defendants, the State of Texas, the Texas Department of Transportation, and William Burnett ("defendants" or "Texas"). Texas removed the case to federal district court. The federal district court remanded the case to the Texas district court. Texas filed a motion in the state district court to dismiss on grounds of state sovereign immunity. That motion was denied by the state district court, and Texas appealed the ruling to the state court of appeals. While that appeal was pending, Texas again removed the case to the federal district court and again moved to dismiss on grounds of state sovereign immunity from suit. The district court dismissed plaintiffs' claims seeking retrospective money damages and prospective injunctive relief for lack of subject matter jurisdiction on grounds that Texas enjoyed immunity from suit under the Eleventh Amendment. The plaintiffs appealed. The predominant issue is whether, in light of Lapides v. Bd. of Regents, 535 U.S. 613 (2002), Texas waived its state sovereign immunity from suit by individuals when it removed this case from state court to federal district court.

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1. Marjorie Meyers, Helen Elkin, Ruth Davis, and Phillip Greenberg ("plaintiffs").

I. Background

Congress enacted the ADA in 1990 to establish a "comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. § 12101(b)(1). The ADA's broad prohibitions of discrimination in public services and accommodations require accessible parking for the sight, mobility and otherwise handicapped. Texas responded to this requirement by providing persons with disabilities two means to obtain the right to use accessible parking spaces: special license plates and parking placards. TEX. TRANSP. CODE ANN. §§ 502.253, 681.002. The special license plates cost no more than regular license plates. Id. § 502.253(d). The portable placards, which afford parking access to disabled persons without specialized license plates, cost five dollars, however, and must be renewed every four years. Id. §§ 681.003, 681.004. The five dollar fee is used to defray the costs of providing the placards. Id. § 681.005(1).

Plaintiffs filed this class action suit on August 11, 1997, in the state district court for Travis County, Texas alleging that the fee collected to pay for the placard program violates regulations promulgated under Title II of the ADA as well as the ADA. ADA § 12132 states that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs or activities ofa public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132. Pursuant to congressionally granted power to promulgate regulations implementing this section, id. § 12134(a), the Attorney General formulated a "surcharge regulation":

> A public entity may not place a surcharge on a particular individual with a disability or any group of individuals with disabilities to cover the costs of measures, such as the provision of auxiliary aids or program accessibility, that are

> required to provide that individual or group with nondiscriminatory treatment required by the Act or this part.

28 C.F.R. § 35.130(f). Plaintiffs alleged that by collecting a fee to pay for the placard program, Texas violated both the ADA and the surcharge regulation.

In September 1997, Texas removed the case to the federal district court for the Western District of Texas, which remanded the case *sua sponte* on the grounds that the Tax Injunction Act barred federal jurisdiction over plaintiffs' suit. The Texas state district court granted plaintiffs' motion for class certification and denied Texas's motion to dismiss because of the state's sovereign immunity. Texas appealed from that ruling to the Texas state court of appeals. While that appeal was pending, we decided in a separate case, Neinast v. State of Texas, 217 F.3d 275 (5th Cir. 2000), that the placard charges were fees, not taxes, and that "the district court erred in holding that the placard funds were a tax and thus within the scope of the Tax Injunction Act." Id. at 279.

Upon learning of our Neinast ruling, Texas removed this case from the Texas court of appeals to federal district court on July17, 2000. Two days later, Texas moved to dismiss plaintiffs' claims for lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1) on the grounds of Texas's Eleventh Amendment immunity. The district court granted the motion to dismiss, holding, inter alia, that because there was "no clear guidance from the [Supreme] Court on whether removal alone constitutes waiver of Eleventh Amendment immunity," "under [then] current Eleventh Amendment jurisprudence" the state "could avail itself of federal court jurisdiction, and then seek a dismissal on Eleventh Amendment grounds." Dist. Ct. Op. of April 16, 2001 at 6. Plaintiffs timely appealed.

II. Analysis

We review de novo a district court's grant of a Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction because of state sovereign immunity. United States v. Texas Tech University, 171 F.3d 279, 288 (5th Cir. 1999).

A. Waiver of State Sovereign Immunity From Private Suit

State sovereign immunity is a fundamental aspect of the sovereignty that the states enjoyed before the ratification of the Constitution and the Eleventh Amendment, and it was preserved intact by the Constitution. Alden v. Maine, 527 U.S. 706, 713 (1999). The presupposition or concept of state sovereign immunity "has two parts: first, that each State is a sovereign entity in our federal system; and second, that it is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent." Florida Prepaid Postsecondary Educ. Expense Bd. v. College Savings Bank, 527 U.S. 627, 634 (1999) (quoting Hans v. Louisiana 134 U.S. 1, 13 (1890)). The term "state sovereign immunity" is used imprecisely by the courts to refer to both parts, i.e., the immunity from suit, and the entity itself, including all of its powers, rights and privileges. See Alden, 527 U.S. at 712-13. Because the Eleventh Amendment recognizes a State's sovereign immunity from suits brought by individuals in federal court, the Supreme Court has often referred to this as "Eleventh Amendment immunity."[2] Id. "Eleventh Amendment immunity" is a misnomer,

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2. The Eleventh Amendment provides:

> The Judicial power of the United States shall not be construed to extend in any suit in law or equity, commenced or prosecuted against one of the United States by Citizens or Subjects of any Foreign State.

however, because that immunity is really an aspect of the Supreme Court's concept of state sovereign immunity and is neither derived from nor limited by the Eleventh Amendment. Id. Nevertheless, the term "Eleventh Amendment immunity" has been used loosely and interchangeably with "state sovereign immunity" to refer to a state's immunity from suit without its consent in federal courts. See, e.g., College Savings Bank v. Florida Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666 (1999) (using both terms), Idaho v. Coeur d'Alene Tribe of Idaho, 521 U.S. 261 (1997) (same). The concept of state sovereign immunity in all of its aspects has been developed by the Supreme Court through its authoritative interpretations of the Constitution based on history, constitutional structure, and jurisprudence. Alden, 527 U.S. at 712-13.

A state's immunity from suit is not absolute. College Savings, 527 U.S. at 670. The Supreme Court has recognized only two circumstances in which an individual may sue a State. "First, Congress may abrogate the states' immunity by authorizing such a suit in the exercise of its power to enforce the Fourteenth Amendment—an Amendment enacted after the Eleventh Amendment and specifically designed to alter the federal-state balance." Id. (citing Fitzpatrick v. Bitzer, 427 U.S. 445 (1976)). "Second, a State may at its pleasure waive its sovereign immunity by consenting to suit." Id. (citing Clark v. Barnard, 108 U.S. 436 (1883)). But the decision to waive that immunity must be voluntary on the part of the sovereign. Generally, the Court will find a waiver either if (1) the state voluntarily invokes federal court jurisdiction, or (2) the state makes a "clear declaration" that it intends to submit itself to federal court jurisdiction. See College Savings 527 U.S. at 675-676 (citing Gunter v. Atlantic Coast Line R. Co., 200 U.S. 273, 284 (1906); Great Northern Life Ins. v. Read, 322 U.S. 47, 54 (1944)).

U.S.CONST. AMDT. XI.

Plaintiffs contend that Texas, by removing this case from state court to federal court, voluntarily invoked federal court jurisdiction and waived its state sovereign immunity from private suit. They rely upon the Supreme Court's recognition in Lapides, that "removal is a form of voluntary invocation of a federal court's jurisdiction" that constitutes "a waiver of Eleventh Amendment immunity." 535 U.S. at 624. On the other hand, Texas contends that the waiver-by-removal rule recognized by Lapides with respect to certain suits based on state-law claims does not apply to the plaintiffs' suit based on federal-law claims. According to Texas, that is so because: first, Lapides limits the effect of its decision to suits based on state-law claims in respect to which the state has waived its immunity in its own courts; and, second, the nature of state sovereign immunity, as implied by the Supreme Court in Alden v. Maine, 527 U.S. 706 (1999), and Pennhurst State School and Hospital v. Halderman, 465 U.S. 89, 98-99 (1984), allows Texas to assert its "underlying sovereign immunity from suit in any court," even after it has waived its "Eleventh Amendment immunity from suit in federal court."

In Lapides, the plaintiff, a professor in the Georgia university system, brought suit against the university board and its officials claiming damages for defamation under state law and for deprivation of his Fourteenth Amendment right to due process under the federal civil rights act, 42 U.S.C. § 1983. 535 U.S. at 616. It was undisputed that the university board was an arm of the state and that Georgia by statute had waived its immunity from suits based on the state-law claims in state court. Id. at 617.

The board and its officials joined in removing the case to federal district court and sought dismissal. Id. at 616. The district court held that the doctrine of qualified immunity barred Lapides's federal-law claims against the university officials but that the board had waived its Eleventh Amendment immunity by removing the case from state to federal court. Id. at 617. The board appealed the

district court's Eleventh Amendment immunity ruling, and the Court of Appeals for the Eleventh Circuit reversed.[3] 251 F.3d 1372 (11th Cir. 2001).

The Supreme Court granted certiorari and reversed, concluding that the State's action of voluntarily agreeing to remove the case to federal court constituted a form of voluntary invocation of the federal court's jurisdiction and a waiver of its Eleventh Amendment immunity.[4] Lapides, 535 U.S. at 620, 624. The Court added, however, that because Lapides had not stated a valid federal claim against the state,[5] its decision did not address whether or how removal would affect federal-law claims or claims in respect to which the state's underlying sovereign immunity had not been waived or abrogated in state court. Id. at 617. Nonetheless, the Court concluded that the question that prompted it to grant certiorari, "whether a state waives its Eleventh Amendment immunity by its affirmative litigation conduct when it removes a case to federal court," was not moot, because Lapides's, state-law

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3. In the appellate court's view, as it was unclear that the state attorney general had the legal authority to waive state sovereign immunity, the board retained the legal right to assert its sovereign immunity from suit by individuals even after removal. Lapides, 251 F.3d at 1375.

4. 535 U.S. at 620. The Court pointed out that removal requires the unanimous consent of all defendants. Id. (citing 28 U.S.C. § 1446(a); Chicago, R.I.& P.R. Co. v. Martin, 178 U.S. 245, 248 (1900)).

5. As the Court explained, Lapides did not state a valid federal claim "because Lapides's only federal claim against the State arises under 42 U. S .C . § 1983, that claim seeks only monetary damages, and we have held that a State is not a 'person' against whom a § 1983 claim for money damages might be asserted." 535 U.S. at 617 (citing Will v. Michigan Dep't of State Police, 491 U.S. 58, 66 (1989)).

tort claims remained pending in federal district court. Id. In view of the differences of opinion among the circuit courts on the certiorari issue, the Court decided to answer the question. Id.

I.

Although the Supreme Court in Lapides circumspectly did not address any issue unnecessary to its decision, we believe that Lapides's interpretation of the voluntary invocation principle, as including the waiver-by-removal rule, applies generally to any private suit which a state removes to federal court. There is no evident basis in law or judicial administration for severely limiting those general principles, or Lapides's substantial overruling of Ford Motor Co. v. Dep't of Treasury of State of Indiana, 323 U.S. 459 (1945), to a small sub-set of federal cases including only state-law claims in respect to which a state has waived immunity therefrom in state court.[6] Moreover, there are many reasons to apply those principles generally.

First, in reaching its conclusion, the Court in Lapides applied a generally applicable principle of federal law based upon a comprehensive consideration of problems associated with states'

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6. This classification excludes "[t]he core of modern federal court jurisdiction[,] cases arising under the Constitution and laws of the United States [,] compris[ing] the largest component of the federal courts' docket and...widely viewed as the most important component of the federal courts' workload." Erwin Chemerinsky, FEDERAL JURISDICTION, § 5.2.1, p. 265 (4th ed. 2003); see Jonathan R. Siegel, *Waivers of State Sovereign Immunity and the Ideology of the Eleventh Amendment*, 52 DUKE L.J. 1167, 1229 (2003) ("Although the particular circumstances of the case may be limited, the reasoning of the case endorses the crucial values underpinning the traditional rule that sovereign immunity is waived if not timely asserted.") (citing Lapides, 535 U.S. 613).

assertions of sovereign immunity after voluntarily invoking federal jurisdiction. Id. at 619-24. The Court in Lapides observed generally that it is anomalous or inconsistent for a state to both invoke federal jurisdiction and claim immunity from federal suit in the same case. Id. at 619. Because permitting states to do so can generate seriously unfair results, the Court noted that over a century ago it had begun to develop the principle that a state's voluntary appearance in federal court amounted to a waiver of its immunity from suit. Id. Subsequently, the Court noted, it had recognized that the principle applied to states' interventions, bankruptcy claims, and voluntarily becoming a party in federal court. Id. (citing Clark, 108 U.S. at 447; Gardner v. New Jersey, 329 U.S. 565, 574 (1947); and Gunter, 200 U.S. at 284). In Lapides, the Court decided, the state, by voluntarily agreeing to remove the case, had voluntarily invoked the federal court's jurisdiction. Id. at 620. Considering the judicial need to avoid inconsistency, anomaly, and unfairness, and Georgia's failure to point to any special feature of removal or of the Lapides case that would justify taking the case out from under the general rule, the Court found no reason to abandon the general principle. Id. at 620-21. Consequently, the Court concluded that removal is a form of voluntary invocation of federal jurisdiction that constitutes the waiver of a state's immunity from suit. Id. at 624.

In explaining why the voluntary invocation principle could not be narrowed to exclude even the special situation in Lapides, the Court gave reasons that argue powerfully for general application of the principle and the waiver by removal rule. Cases in which the state's motive for removal is benign cannot be excepted because "motives are difficult to evaluate, while jurisdictional rules should be clear" and making such an exception "would permit States to achieve unfair tactical advantages, if not in this case, in others." Id. at 621. Cases involving "suits for money damages against the State—the heart of the Eleventh Amendment's concern" must be

included because the principle enunciated in Gunter, Gardner and Clark "did not turn upon the nature of the relief sought... [a]nd that principle remains sound as applied to suits for money damages." Id at 620. Finally, the Court's more recent cases requiring "a 'clear' indication of the State's intent to waive its immunity," such as College Savings, do not undermine the voluntary invocation principle. To the contrary, College Savings "distinguished the kind of constructive waivers repudiated there from waivers effected by litigation conduct." Id. Although the state's intent to waive its immunity must be clearly indicated, "finding waiver in the litigation context" rests upon the "judicial need to avoid inconsistency, anomaly, and unfairness," and not upon a "State's actual preference or desire, which might, after all, favor selective use of 'immunity' to achieve litigation advantages." Id. Regarding waivers by removal, "[t]he relevant 'clarity' here must focus on the litigation act the State takes that creates the waiver. And that act—removal—is clear."[7] Id.

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7. Texas argues that the present case is controlled by Neinast v. Texas, 217 F.3d 275 (2000), in which this court held that the state, which had been sued in federal court, did not waive its immunity by filing a 12(b)(6) motion because it did not proceed past the motion and answer stage to the merits while holding back an immunity defense. Id. at 279-280. Neinast is distinguishable and inapposite. In Neinast the state did not remove the case to federal court because it was filed in federal court originally. Thus, Neinast did not fall under the waiver by removal rule. In the present case, however, Texas's removal waived its immunity under the waiver by removal rule and voluntary invocation principle explained in Lapides. Texas's assertion at the time of removal that it did not intend to defend and removed for the sole purpose of asserting sovereign immunity did not prevent waiver of that immunity by removal. The act of removal without more is sufficient to waive the state's immunity. The state's "actual preference or desire" and "benign motive" are not relevant to a waiver by removal. Lapides, 535 U.S. at 620-621.

Emphasizing that point, the Court stated:

> "[T]he rule is a clear one, ... it says that removal is a form of voluntary invocation of a federal court's jurisdiction sufficient to waive the State's otherwise valid objection. to litigation of a matter (here of state law) in a federal forum.

Id. at 623-624.[8]

The Court expressly limited its answer in response to the certiorari question to the context of "state law claims, in respect to which the State had waived immunity in its own courts." Id. at 617. However, in formulating its rationale, the Court did not restrict itself to facts, rules, or reasons peculiar to the Lapides case. Rather, throughout its opinion, the Court's reasoning, rule-making, and choice of precepts were derived from generally applicable principles serving "the judicial need to avoid inconsistency, anomaly, and unfairness" in states' claims of immunity in all types of federal litigation. 535 U.S. at 620. Further, a reading of Lapides within the context of the Court's previous development: and application of the voluntary invocation principle convinces us that, just as the Court concluded about the Lapides case, there is nothing special about the present case or its removal, that would justify our taking it out from under the general legal principle requiring waiver.

Second, the general applicability of the voluntary invocation principle and the waiver-by-removal rule is demonstrated by their history. As the Lapides opinion observes, "more than a century ago this Court indicated that a State's voluntary appearance in federal court amounted to a waiver of its Eleventh Amendment immunity."

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8. See Gil Seinfeld, *Waiver-in-Litigation: Eleventh Amendment Immunity and the Voluntariness Question,* 63 OHIO ST. L.J. 871, 875-890 (2002) (explaining the history and development of the Supreme Court's cases finding waiver of state sovereign immunity by litigation conduct).

Id. at 619, (citing and quoting Clark, 108 U.S. at 447 ("State's 'voluntary appearance in federal court as an intervenor avoids Eleventh Amendment inquiry"); Gardner, 329 U.S. at 574 ("[A] State 'waives any immunity ... respecting the adjudication of' a [bankruptcy] 'claim' that it voluntarily files in federal court."); Gunter, 200 U.S. at 284 ("[W]here a State voluntarily becomes a party to a cause and submits its rights for judicial determination, it will be bound thereby and cannot escape the result of its own voluntary act by invoking the prohibitions of the Eleventh Amendment.")). "The Court has long accepted this statement of the law as valid, often citing with approval the cases embodying that principle." Lapides, 535 U.S. at 619 (citing College Savings, 527 U.S. at 681, n. 3 (1999) (citing Gardner); Employees of Dept. of Public Health and Welfare of Mo. v. Dept of Public Health and Welfare of Mo., 411 U.S. 279, 294, and n. 10 (1973) (Marshall, J., concurring in result.) (citing Clark); Petty v. Tennessee-Missouri Bridge Comm'n, 359 U.S. 275, 276 (1959) (citing Clark)).

Until Ford, the Supreme Court fairly consistently applied the"voluntary invocation" principle, concluding that a state submits itself to federal court jurisdiction when it voluntarily appears, intervenes, files a claim, or becomes a party to a cause in federal court.[9] Gunter, 200 U.S. at 284. In Ford, however, the Court

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9. See Siegel, *Waivers of State Sovereign Immunity,* 52 DUKE L.J. at 1167-1168 ("[P]rior to 1945, the Supreme Court–even as it enforced a broad, substantive rule of state sovereign immunity-applied a sensible doctrine of waiver that balanced the interests of states with those of private parties and the federal judicial system.... Beginning in 1945 ... new rules of waiver permitted states to abuse their immunity and waste federal judicial resources by litigating the merits of a case while holding an immunity defense in reserve."); Seinfeld, *Waiver-in-Litigation,* 63 OHIO ST. L.J. at 875-890.

confused the principle by holding that a state which had voluntarily participated in litigation could, nevertheless, successfully assert its sovereign immunity objection even after the case had reached the Supreme Court. 323 U.S. at 467.

But the Supreme Court began to clarify and restore the voluntary invocation principle in Wisconsin Dep't Of Corrections v. Schacht, 524 U.S. 381 (1998). The Court unanimously held that the Eleventh Amendment does not automatically destroy a federal court's jurisdiction over a claim; rather, it grants the state a legal power to assert a sovereign immunity defense, which it may raise or waive. Id. at 389 (citing Clark, 108 U.S. 436; Atascadero State Hospital v. Scanlon, 473 U.S. 234, 241 (1985)). The Court added that unless the state raises its sovereignty objection or defense, the court can ignore it; it need not raise the defect on its own. 524 U.S. at 389 (citing Patsy v. Board of Regents of Fla., 457 U.S.496, 515, n. 19 (1982)).

Justice Kennedy, concurring in Schacht, stated that, because no party raised it, the court had not reached or considered the argument that, by giving its express consent to removal of the case, Wisconsin had waived its Eleventh Amendment immunity. See 524 U.S. at 393 (Kennedy, J., concurring). He urged consideration of the question in some later case, however, because of the difficult problem created when the state consented to removal but then immediately raised its objection to the district court's jurisdiction based on its sovereign immunity. Id. He expressed doubts about the rule of Ford, and other cases, which had said the Eleventh Amendment bar may be asserted for the first time on appeal, so that a state sued in federal court does not waive its immunity objection simply by appearing and defending on the merits. Id. at 394. He pointed out that:

> In permitting the belated assertion of the Eleventh Amendment bar, we allow States to proceed to judgment without facing any real risk of adverse consequences. Should the State prevail, the plaintiff would be bound by principles of res judicata. If the State were to lose, however, it could void the entire judgment simply by asserting its immunity on appeal.

Id. Noticing that the Ford rule was a departure from the usual rules of waiver, Justice Kennedy maintained that by making the rule more consistent with the practice regarding personal jurisdiction the Court could prevent states from "gaining an unfair advantage." Id. at 395. Justice Kennedy suggested that the better rule had been expressed in Clark and Gardner, in which the Court adopted and applied the voluntary invocation principle.[10] Id.

One year later, the Court reaffirmed the principle that a state waives its sovereign immunity by voluntarily invoking the jurisdiction of the federal courts. Justice Scalia, writing for the majority in College Savings, recognized that valid waivers of sovereign immunity may occur pursuant to the "voluntary invocation" principle. 527 U.S. 666, 682 n. 3 (citing Gardner as "stand[ing] for the unremarkable proposition that a State waives its sovereign immunity by voluntarily invoking the jurisdiction of the federal courts").

During the long history of the voluntary invocation principle prior to Lapides, the Supreme Court gave no indication that the

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10. Justice Kennedy also recommended overruling Ford's requirement that the state attorney who consented to the removal be authorized under state law to waive the Eleventh Amendment on behalf of the state. "[T]he state's consent [to removal] amounted to a direct invocation of the jurisdiction of the federal courts." Id. at 397.

principle applied only to state-law claims or that it mattered whether the state had waived its immunity from suit in its own courts. Indeed, the problems caused by the removal of federal claims in Schacht prompted Justice Kenned's influential concurring opinion that led to the Court's decision in Lapides. See Schact, 524 U.S. at 393-98 (Kennedy, J., concurring). Moreover, neither Justice Kennedy nor the unanimous court in Schacht expressed any interest in whether the state had waived its immunity from federal-law claims in state court. See generally, 524 U.S. 381-398. Similarly, in College Savings, the Court reaffirmed its approval of the voluntary invocation principle in its discussion of whether a state had waived its immunity from suit based on a federal-law claim. 527 U.S. 666. As in Schacht, the Court in College Savings did not advert to whether the state had waived immunity as to the claim in state court.

Third, in order to remove an impediment to its reaffirmation of the voluntary invocation principle, the Court substantially overruled its previous decision in Ford. Lapides, 535 U.S. at 614-15. In that case, the Court had held that a state could assert its immunity for the first time in the Supreme Court, although its attorney general had actively participated on behalf of the state in the litigation below, because that particular state's law did not authorize its attorney general to waive the state's immunity. Ford, 323 U.S. at 459. The Court in Lapides recognized that the Ford rule conflicted with the goal of the voluntary invocation principle to eliminate problems of inconsistency in state claims of immunity after removing cases to federal court. 535 U.S. at 622-23. Further, the Court determined that the question of whether a particular form of state action amounts to waiver is a federal question that should be decided under a federal rule. Id. at 623. Accordingly, the Court concluded that a rule of federal law that finds waiver through invocation of federal court jurisdiction by an attorney authorized to represent the state in the pertinent litigation would avoid

inconsistency and unfairness. Id. at 622-24. Because Ford was inconsistent with the basic rationale of the voluntary invocation principle, the Court overruled Ford insofar as it otherwise would apply. Id. at 623. This holding by the Supreme Court—that the voluntary invocation principle should be applied uniformly and consistently—lends further support for our conclusion that the principle should apply equally to state and federal claims.

Further, the Court granted certiorari in Lapides to consider the general problem caused by state removals and assertions of immunity in both state and federal-law claim cases. Accordingly, the Court agreed to consider the general question of whether "a state waive[s] its Eleventh Amendment immunity by its affirmative litigation conduct when it removes a case to federal court...." 535 U.S. at 617. The Court described the division of opinions among circuits giving rise to its review by citing cases dealing with both federal and state-law claims:

> Compare McLaughlin v. Board of Trustees of State Colleges of Colo., 215 F.3d 1168, 1171 (10th Cir. 2000) (removal waives immunity regardless of attorney general's state-law waiver authority) [emphasis added]; and Newfield House, Inc. v. Massachusetts Dept. of Public Welfare, 651 F.2d 32, 36, n. 3 (1st Cir. 1981) (similar); with Estate of Porter ex rel. Nelson v. Illinois, 36 F.3d 684, 690-691 (7th Cir. 1994) (removal does not waive immunity)[emphasis added]; Silver v. Baggiano, 804 F.2d1211, 1214 (11th Cir. 1986) (similar); and Gwinn Area Community Schools v. Michigan, 741 F.2d 840, 846- 847 (6th Cir. 1984) (similar).

Id. at 618. Of those five cases, two involved questions of waiver of immunity only as to federal-law claims,[11] two involved waivers only as to state-law claims,[12] and one involved waivers as to both federal and state-law claims.[13]

Finally, in cases subsequent to Lapides, the preponderant view of the federal courts of appeals appears to be that Lapides's interpretation of the voluntary invocation principle and its waiver-by-removal rule are fully applicable to suits based on federal-law claims.

Two federal courts of appeals squarely addressed the issue and decided that a state waives its immunity from suit based on a federal-law claim by removing the case from state to federal court. See Embury v. King, 361 F.3d 562, 564 (9th Cir. 2004) ("We conclude that the rule in Lapides applies to federal claims as well as to state claims.... Nothing in the reasoning of Lapides supports limiting the waiver to the claims asserted in the original complaint, or to state law claims only."); Estes v. Wyoming Dept. Of Transp., 302 F.3d 1200, 1206 (10th Cir. 2002) (explaining that by removing an ADA claim to federal court the state waived its sovereign immunity even if it removed the case solely "to challenge the jurisdiction of the federal forum.").

Other federal appellate courts demonstrated the same view in their discussions of Lapides and the voluntary invocation

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11. See McLaughlin, 215 F.3d 1168; Estate of Porter, 36 F.3d 684.

12. See Gwinn Area Community Schools, 741 F.2d 840; Newfield House, 651 F.2d 32.

13. See Silver, 804 F.2d 1211.

principle.[14] See, e.g., Skelton v. Henry, 390 F.3d 614, 618 (8th Cir. 2004) (explaining, in the context of a federal claim, that "waiver in litigation prevents states from selectively invoking immunity to achieve litigation advantages" and the court therefore should focus on the state's "action in litigation ... [rather than] on the intention of the state to waive immunity"); Union Electric Company v. Missouri Dept. of Conservation, 366 F.3d 655, 659 (8th Cir. 2004) (explaining, when faced with a federal claim, that the "general rule regarding waiver" is that "when a state voluntarily invokes federal jurisdiction...[it] cannot escape the result of its own voluntary act by invoking the prohibitions of the Eleventh Amendment"); New Hampshire v. Ramsey, 366 F.3d 1, 16-17 (1st Cir. 2004) (analyzing a federal claim and describing the Supreme Court's "core concern" in Lapides as being that "a state cannot selectively invoke its Eleventh Amendment immunity to gain litigation advantage"); In re: Charter Oak Associates, 361 F.3d 760, 769 (2d Cir. 2004) (explaining, in a bankruptcy case, that the "waiver-by-litigation doctrine" is driven by "fairness and consistency concerns" that override a "State's actual preference or desire"); Ku v. State of Tennessee, 322 F.3d 431, 431-35 (6th Cir. 2003) (explaining, when faced with a federal claim, that "removal is a form of voluntary invocation of a federal courts' jurisdiction sufficient to waive the State's ... objection to litigation of a matter ... in a federal forum"); Rhode Island Department of Environmental Management v. United States, 304 F.3d 31, 50, 50 n. 7 (1st Cir.

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14. Contrary to Texas' argument, Watters v. Washington Metropolitan Area Transit Authority, 295 F.3d 36 (D.C. Cir. 2002) is not apposite to the case. It involves whether an interstate compact contained a "clear statement" waiving state sovereign immunity from suits on attorneys' liens through a general "sue or be sued" clause in its charter. The court's remarks about waiver by removal were not relevant to its decision. Id. at 42 n. 13.

2002)[15] (describing "waiver occasioned by the state's litigating conduct" as a "well established" principle in the Circuit, and citing, inter alia, Newfield House, 651 F.2d 32, 36 n.2 (finding waiver by removal)). Because of their reliance on Lapides's language and principles, we infer that in a proper case these courts would apply the voluntary invocation principle as interpreted by Lapides and hold that a state waives immunity from private suits based on federal law claims by removing the case to federal court.

In two state-law claim cases, a situation identical to Lapides's was presented; that is, the removed suits involved state-law claims in respect to which the state had waived immunity in its own court. Omosegbon v. Wells, 335 F.3d 668 (7th Cir. 2003); Bank of Lake Tahoe v. Bank of America, 318 F.3d 914 (9th Cir. 2003). Predictably, in accord with Lapides, those courts concluded that the states waived immunity from suit when they removed the cases to federal court. Significantly, however, neither court indicated that it would reach a different result if the state had not waived immunity in state courts or if the case had also involved federal-law claims.

One federal court of appeals, Stewart v. North Carolina, 393F.3d 484 (4th Cir. 2005), considered the removal of a state-law

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15. Contrary to Texas's argument, Rhode Island Department of Environmental Management ("RIDEM"), 304 F.3d 31, supports the conclusion that the First Circuit will apply waiver by removal to federal-law claims when it is appropriate. RIDEM, a state's arm, did not remove or voluntarily invoke federal court jurisdiction. RIDEM was forced to seek injunctive relief from federal administrative ALJ's denial of its sovereign immunity claim. Id. at 50. Second, a state or other alternate forum was not available to RIDEM. Id. Finally, RIDEM's opponent forfeited its waiver argument by failing to raise it in district court. Id.

claim in a situation that did not fit the Lapides pattern.[16] North Carolina had not waived immunity from suit on the claim in its own courts. The Fourth Circuit found it improper to rely "exclusively"on Lapides, because the Court in Lapides reserved judgment as to whether removal constituted waiver outside its exact situation. Id. at 490. "Nevertheless," the Fourth Circuit stated, "the principles animating Lapides shed light on the issue we resolve today." Id.

Accordingly, the court in Stewart recognized the general voluntary invocation principle established in Gardner, Gunter, and Clark, and proceeded to explain why Lapides fell under the principle but Stewart did not. In essence, the court found that Georgia's conduct in Lapides fell under the general rule requiring waiver because Georgia sought to achieve an unfair tactical advantage by regaining through removal the immunity it had abandoned previously; whereas, North Carolina in Stewart merely sought to "employ removal in the same manner as any other defendant facing federal claims." Id.

Although Stewart does not bind us or directly bear on removal of federal law claims, we conclude that it is not persuasive because its rationale misconstrues important principles animating Lapides. First, a state is not "like any other defendant" as Stewart maintains. A state possesses sovereign immunity that can be used "to achieve unfair tactical advantages, if not in this case, in others." Lapides, 535 U.S. at 614. Stewart thus misunderstands that the voluntary invocation principle as explained by Lapides rests on a concern for preventing the potential for unfair tactics, not just upon the need to

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16. Initially, the plaintiffs asserted a federal claim. On appeal, however, appellants challenged the district court decision only with respect to state-law tort claims. Stewart, 393 F.3d at 487.

sanction the actual achievement of an unfair tactical advantage. Permitting states to "follow their litigation interests by freely asserting both claims [i.e., both invoking federal jurisdiction and claiming immunity] in the same case could generate seriously unfair results." Id. at 619. Second, the Supreme Court in Lapides envisions the voluntary invocation principle and waiver-by-removal rule as applying to all sovereigns regardless of their motives. "A benign motive . cannot make the critical difference.... Motives are difficult to evaluate, while jurisdictional rules should be clear." Id. at 621. And finally, the waiver by litigation conduct principles are based on the "judicial need to avoid inconsistency, anomaly, and unfairness, and not upon a State's actual preference or desire, which might, after all, favor selective use of 'immunity' to achieve litigation advantages." Id. at 620.

In other words, the voluntary invocation principle applies generally in all cases for the sake of consistency, in order to prevent and ward off all actual and potential unfairness, whether egregious or seemingly innocuous. Thus, it is a mistake to read the general principle or the waiver-by-removal rule as focused only on specific or comparative abuses such as attempting to "regain" an "abandoned" immunity. North Carolina in Stewart, and Texas in the present case, acted inconsistently by both invoking federal jurisdiction and claiming immunity in the same case.[17] Whether Texas's conduct, in removing this case to federal court from the state appellate court to "regain" an immunity that its own courts had found unwarranted, is more or less unfair than Georgia's removal

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17. Lapides, 535 U.S. at 619 ("It would seem anomalous or inconsistent for a State both (1) to invoke federal jurisdiction, thereby contending that the 'Judicial power of the United States' extends to the case at hand, and (2) to claim Eleventh Amendment immunity, thereby denying that the 'Judicial power of the United States' extends to the case at hand.").

and reclaiming of its immunity in Lapides is not relevant. The voluntary invocation principle and the waiver-by-removal rule as explained by Lapides evolved not merely to quantify and compare actual unfair advantages but to eliminate the potential of unfairness by the enforcement of clear jurisdictional rules having genuine preventive effect.[18]

For all of these reasons, we are not persuaded by Texas's argument that Lapides must be read as limiting the ambit of the voluntary invocation principle to cases involving state-law claims with respect to which the state has waived immunity in its own courts. Of course, the Court in Lapides prudently did not address issues beyond this compass. But, as the Fourth Circuit correctly recognized in Stewart, we cannot shut our eyes when "the principles animating Lapides shed light on the issue we resolve today." 393 F.3d at 489. We conclude that the principles of voluntary invocation and waiver by removal as explained in Lapides and as facilitated by its overruling of Ford apply to the present case.

2.

Texas's second argument is based on a novel theory of the structure of state sovereign immunity. In essence, Texas's theory is that a state has two kinds of immunity against private suit that it may assert: (1) its basic or inherent immunity from private suit which it may assert in any court; and (2) its Eleventh Amendment forum immunity from suit in federal court. As the names imply, Texas apparently considers the first immunity to be inherent in the

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18. 535 U.S. at 619 ("[A] Constitution that permitted States to follow their litigation interests by freely asserting both claims in the same case could generate seriously unfair results.").

state's sovereignty, and the second immunity to have been confirmed by the Eleventh Amendment.[19]

Further, Texas contends, after a state waives its Eleventh Amendment forum immunity by removing a case to federal court, the state may still assert its basic or inherent immunity in the same case to have the plaintiffs' suit dismissed, if the state has not waived its immunity from suit for such a claim in state court. Therefore, under its theory, Texas contends that if a state, which has not waived its immunity as to a claim in state court, removes a suit on such a claim to federal court, even though the state thereby waived its Eleventh Amendment forum immunity by the removal, that state may still assert its inherent or basic immunity from suit and have the plaintiffs' suit dismissed.

Texas claims that its theory of state immunity structure is supported by two Supreme Court cases, Alden v. Maine, 527 U.S. 706 (1999), and Pennhurst State School v. Halderman, 465 U.S. 89 (1984). But Texas does not explain how or why; Texas merely states its conclusions about the structure of sovereign immunity and points to the pages in the two opinions that it claims as authority and gives no further explanation. Thus, there are large gaps in Texas's analysis. For example, there is no explanation of how Texas's theory of duplicative immunities from suit can be derived from Alden and Pennhurst; and no effort is made to explain historically or otherwise how the Eleventh Amendment could have augmented the sovereignty of the states that antedated the Constitution and remained intact after ratification. We are left to

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19. Texas uses the term "confirm" instead of "create." No matter how Texas contends the Eleventh Amendment is responsible for bringing about the second separate "Eleventh Amendment forum immunity," however, the effect is the same: Texas's argument is based on a state having two separate immunities from suit, one inherent, and one attributable to the Eleventh Amendment.

bridge these gaps on our own, and we conclude that it cannot be done. There is no support for Texas's theory on the pages it cites or anywhere in the Supreme Court's opinions.

Moreover, there is an irreconcilable conflict between Texas's theory and the Supreme Court's rationale in Alden. Texas's theory is based on the idea that a state has two different immunities from suit, an inherent immunity assertable in any court, and an Eleventh Amendment immunity assertable in federal court. To the contrary, Alden's rationale is that the states' sovereign immunity from suit by individuals is the same immunity they enjoyed prior to the Constitution and that the states' immunity from suit was not changed, limited or added to by the Eleventh Amendment.[20] 527 U.S. at 712-14. The Court in Alden held that the States retain sovereign immunity from private suit in their own courts—an immunity beyond the congressional power to abrogate by Article I legislation—because it was preserved intact by the Constitution since its ratification, and was not created or limited by the Eleventh Amendment. Id. Thus, in Alden, the Supreme Court rejected the notion that a separate form of sovereign immunity from suit was created for the states by the Eleventh Amendment.[21] Id. at 728.

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20. The Court maintained that:

> [T]he States' immunity from suit is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today (either literally or by virtue of their admission into the Union upon an equal footing with the other States) except as altered by the plan of the Convention or certain constitutional Amendments.

Id. at 713.

21. The Court explained that "sovereign immunity derives not from the Eleventh Amendment but from the structure of the original Constitution itself." Id. at 728 (citing Idaho v. Coeur d'Alene Tribe of

Indeed, the Court maintained that the term "Eleventh Amendment immunity" is a misnomer because the states have no other sovereign immunity from suit than that which they brought intact into the union. Id. at 713.

In sum, the Court made clear in Alden that there is no such thing as an Eleventh Amendment immunity separate and apart from state sovereign immunity, that a state's sovereign immunity from suit is now and always has been inherent within its sovereignty, and that the Eleventh Amendment did not create any new immunity but merely overruled the Supreme Court's erroneous decision in Chisolm v. Georgia. Id. at 713-727. Consequently, Texas's argument and theory, which depend totally upon there being an "Eleventh Amendment forum immunity" separate from each state's sovereign immunity from suit, find no basis in Alden or the current view of the Supreme Court's majority.

Texas also represents that Pennhurst validates its conception and analysis of sovereign immunity by "requiring [the] State's express consent to suit in federal forum regarding claims for which underlying sovereign immunity is waived in state court." Tex. Br. at 11. This description of Pennhurst (in Texas's words, not the Court's) is so incomplete, inaccurate, and ambiguous that it obscures and misconstrues the issue decided in that case and attempts to leave the false impression that Pennhurst's ruling on a

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Idaho, 521 U.S. 261, 267-268 (1997) (acknowledging "the broader concept of immunity, implicit in the Constitution, which we have regarded the Eleventh Amendment as [only] evidencing and exemplifying"); Seminole Tribe [of Florida v. Florida, 517 U.S. 44,] 55-56; Pennhurst, 465 U.S. at 98-99; Ex parte New York, 256 U.S.490, 497 (1921)).

"State's express consent to suit" should apply by analogy to Lapides and this case.

Accurately presented, however, Pennhurst differs from Lapides and this case so significantly that its interjection here is plainly inappropriate and somewhat questionable. Contrary to Texas's representation, Pennhurst does not say anything about "claims for which underlying sovereign immunity is waived in state court." In Pennhurst plaintiffs sued Pennsylvania state and county officials in federal court for Eighth Amendment violations because of conditions of a residence and school for retarded persons. 465 U.S. at 92-93. Pennhurst was not removed to federal court like Lapides and this case, for it was never in state court. Most important, Pennhurst did not present an issue of waiver of immunity by removal as Lapides and this case do. The issue in Pennhurst was whether a state statute amounted to a "clear declaration" that Pennsylvania intended to submit itself to federal court jurisdiction. Id. at 99 n. 9. The Court held that the statute did not submit the state to federal jurisdiction because it did not specifically and expressly say that Pennsylvania consented to suit in federal court. Id. at 99. Lapides and the present case are quite different. They hold that a state's removal of a case into federal court, without more, clearly demonstrates the state's consent to invoke and submit to federal jurisdiction so that the general legal principle of voluntary invocation requiring waiver of immunity ought to apply. Pennhurst is devoid of any feature that is analogous to this case or that would lend any support to Texas's theory of sovereign immunity structure. Hence, it is inapposite, irrelevant and does not support Texas's arguments in any respect.

For these reasons, neither Alden nor Pennhurst or any of the Supreme Court's authoritative interpretations of the Constitution provide any basis of support for Texas's constitutional theory or arguments. Instead, Texas's arguments are in conflict with the Supreme Court's decisions. Accordingly, we conclude that Texas

has failed to set forth any valid reason that we should not apply the principles explained by Lapides to the present case.

B. The Constitution Does Not Create State Sovereign Immunity or Prescribe its Scope; The Law of Each State Determines the Nature of its Immunities; Thus, it is Possible that a State May Retain a Separate Immunity from Liability after Waiver of its Immunity from Suit.

Although we find no support for Texas's theory that state sovereign immunity is composed of two separate immunities from suit, further analysis convinces us that the Supreme Court's cases support a different interpretation and conclusion, viz., that a sovereign enjoys two kinds of immunity that it may choose to waive or retain separately—immunity from suit and immunity from liability. This concept is different from Texas's theory in several important respects: (1) it is consistent with the Court's view in Alden that the Constitution protects but does not create the states' sovereign immunity, and that the Eleventh Amendment did not create, change or add to that immunity; (2) it is consistent with Lapides in that it would not allow a state to assert its immunity from suit twice in the same case; and (3) consistently with the Court's cases, it would allow a state, if its law authorizes, to waive its immunity from suit without waiving its immunity from liability.

Texas's theory that the Constitution prescribes a specific rigid structure for each state's sovereign immunity conflicts with the first principles of our federation. Because each state was considered to have retained the individual sovereignty it enjoyed before the union, the structure of the Constitution allows for variation between the nature and structure of each state's immunities from suit and liability. This is consistent with the Supreme Court's long held view that sovereign immunity is a privilege that each state may waive at its pleasure. See College Savings, 527 U.S. at 675. As a

result, the patterns of sovereign immunities maintained by the states vary considerably.[22]

Rather than require that the states adhere to a prescribed plan, the Court's decisions envision a Constitution that affords the states discretion to waive or vary the nature and elements of their sovereign immunity. Id. Consequently, courts must look to the law of the particular state in determining whether it has established a separate immunity against liability for purposes of waiver.[23] Unlike a state's waiver of its immunity from suit in federal court, the state's waiver or retention of a separate immunity from liability is not a matter in which there is an overriding federal interest justifying the application of a federal rule.[24] For these reasons, we

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22. See, e.g., Matthew J. Whitten, *Fiction Becomes Reality: When will Texas Abrogate the "Catch-22" of Sovereign Immunity When it Comes to Contracts?* 37 TEX. TECH L. R. 243, 247, 260 (2004) (explaining that Arizona has waived its sovereign immunity from both suit and liability for contracts disputes, but Texas has waived its immunity from liability but not its immunity from suit in such matters). As another example, the Eleventh Circuit has explained that the Florida sovereign immunity provides immunity only from liability and not suit. CSX Transp. Inc. v. Kissimme Utility Authority, 153 F.3d. 1283, 1286 (11th Cir. 1998).

23. In general, "the substantive law to be applied by the federal courts in any case is state law, except when the matter before the court is governed by the United States Constitution, an act of congress, a treaty, international law, the domestic law of another country, or, in special circumstances, federal common law." 19 Charles Alan Wright et al., FEDERAL PRACTICE AND PROCEDURE : JURISDICTION § 4501, at 2 (2d ed. 1996) (discussing the Federal Rules of Decision Act, 28 U.S.C. § 1652 and constitutional considerations)); see Siegel, *Waivers of State Sovereign Immunity,* 52 DUKE L.J. at 1224-1225.

24. See Lapides, 535 U.S. at 622-623; Byrd v. Blue Ridge Rural Electric Cooperative, Inc., 356 U.S. 525 (1958); 19 Charles Alan Wright

conclude that the Constitution permits a state whose law provides that it possesses an immunity from liability separate from its immunity from suit to show that its waiver of one does not affect its enjoyment of the other.

The foregoing principles are reflected in the Supreme Court's frequent references to sovereign immunity as affording both immunity from liability and immunity from private suits. The Court has often indicated that the purpose of state sovereign immunity is to protect the state from being held liable by its creditors as well as to safeguard it from private suits filed without its consent.

In Lapides the Court stated that 'suits for money damages against the State [are] the heart of the Eleventh Amendment's concern." id. 620 More recently, the Court explained: "Sovereign immunity does not merely constitute a defense to monetary liability or even to all types of liability. Rather it provides an immunity from suit." Fed. Mar. Comm'n v. South Carolina State Ports Authority, 535 U.S. 743, 766 (2002); see Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy Inc., 506 U.S. 139, 145-46 (1993) (rejecting state's argument that sovereign immunity is only a defense to liability and explaining that it is also an immunity from suit); Edelman v. Jordan, 415 U.S. 651, 662-64 (1974) (describing state sovereign immunity as protecting states against both "suits" and "liability"). Historically, the "[a]doption of the [Eleventh] Amendment responded most immediately to the States' fears that 'federal courts would force them to pay their Revolutionary War debts, leading to their financial ruin.'" Hess v. Port Authority Trans-Hudson Corp., 513 U.S. 30, 39, 39 n. 9 (1994) (quoting Pennhurst, 465 U.S. at 151 (Stevens, J., dissenting); and citing Petty v. Tennessee-Missouri Bridge Comm'n, 359 U.S. 275, 276, n. 1

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e.t. al., FEDERAL PRACTICE AND PROCEDURE § 4520 (2d ed. 1996).

(1959); Missouri v. Fiske, 290 U.S. 18, 27 (1933)); see also Lake Country Estates, Inc. v. Tahoe Regional Planning Agency, 440 U.S. 391, 401 (1979) (explaining that a goal of sovereign immunity is to protect the state's treasury).

Corroborating that sovereigns may provide for waiver of immunity from liability separately from suit immunity, one federal court of appeals has stated, in dictum, that "[c]ertainly, a state may waive its immunity from substantive liability without waiving its immunity from suit in a federal forum." New Hampshire v. Ramsey, 366 F.3d 1, 15 (1st Cir. 2004) (citing College Savings, 527 U.S. at 676; Atascadero, 473 U.S. at 241). Two other federal courts of appeals have held that the federal government's sovereign immunity, unlike that of the states, is a defense to liability but not an immunity from suit. See Alaska v. United States, 64 F.3d 1352 (9th Cir. 1995) (explaining, when comparing federal and state sovereign immunity, that while state sovereign immunity entitles the state to avoid litigation in a federal court, federal sovereign immunity is only a defense to liability); Pullman Construction Industries v. United States, 23 F.3d 1166 (7th Cir. 1994) (same); cf. CSX Transp., 153 F.3d. at 1286 (explaining that sovereign immunity under Florida law provides immunity only from liability and not suit).

Concurrently, there is a growing body of impressive scholarly thought favoring the view that the Supreme Court has implicitly recognized that state sovereign immunity consists of two separate and different kinds of immunity, immunity from suit and immunity from liability.[25] We come to substantially the same conclusion.

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25. See Siegel, *Waivers of State Sovereign Immunity*, 52 DUKE L. J. at 1234 ("[S]tate sovereign immunity has two independent aspects: it is partly an immunity from suit in a particular forum (federal court) and partly a substantive immunity from liability.... [A state] may waive its forum immunity without waiving its underlying immunity from liability.

The commentators' reading of the cases is reasonable and tends to be persuasive. We conclude, however, that it is more appropriate to say that the Court's cases accommodate the view that the Constitution guarantees a state's prerogative, by its own law, to treat its immunity from liability as separate from its immunity from suit for purposes of waiver or relinquishment. For these reasons, we conclude that the Constitution permits and protects a state's right to relinquish its immunity from suit while retaining its immunity from liability, or vice versa, but that it does not require a state to do so.[26]

In sum, under the principles of federal law we have discussed, when Texas removed this case to federal court it voluntarily invoked the jurisdiction of the federal courts and waived its immunity from suit in federal court. See Lapides, 535 U.S. 613. Whether Texas has retained a separate immunity from liability is an issue that must be decided according to that state's law.

C. Remaining Arguments

The only matter before us is plaintiffs' appeal from the district court's ruling granting Texas's 12(b)(1) motion to dismiss for lack

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Moreover, removal should be understood to waive only forum immunity."); cf., Carlos Manuel Vazquez, *Sovereign Immunity, Due Process, and The Alden Trilogy*, 109 YALE L.J. 1927, 1930 (2000) (Arguing that in Alden and College Savings the Supreme Court "rejected the 'forum-allocation' interpretation of the Eleventh Amendment, and implicitly adopted what I have called the 'immunity-from-liability' interpretation, under which the states are immune from being subjected to damage liability to individuals.") (citing Carlos Manuel Vazquez, *What is Eleventh Amendment Immunity?*, 106 YALE L.J. 1683, 1700-08 (1997) ("describing the 'forum-allocation' and 'immunity-from liability' interpretations.").

26. See supra note 22.

of subject matter jurisdiction based on Texas's sovereign immunity from suit. In the district court's rulings complained of on appeal, the court held that plaintiffs failed to establish subject matter jurisdiction by showing that Texas's sovereign immunity from suit had been either waived or abrogated. Specifically, the court ruled that (1) Texas had not waived its immunity from suit by removing the case to federal court and (2) Congress had not validly abrogated Texas's immunity from suit by its enactment of ADA Title II. We conclude, in the light of Lapides, that Texas waived its immunity from suit in federal court when it removed the case to federal court. Consequently, the district court's judgment, which was rendered prior to Lapides, is in error in its conclusion that plaintiffs had not established subject matter jurisdiction based on waiver by removal. Because Texas waived its immunity from suit by removal of this case to federal court, we will reverse and remand on this ground. Thus, we need not reach or decide whether the district court erred in finding that Congress did not validly abrogate Texas's immunity from suit by ADA Title II.[27]

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27. Moreover, our holding in Neinast v. Texas, 217 F. 3d 275 (5th Cir. 2000), that the ADA regulation did not validly abrogate the state's Eleventh Amendment immunity from suit does not foreclose the establishment of subject matter jurisdiction in accord with Lapides in the present case based on Texas's waiver of immunity by removal. Because there was no removal in Neinast, and there was no abrogation issue in Lapides, Neinast does not conflict with Lapides or our holding in the present case.

Texas's other arguments based on Neinast were not raised below and are either (1) irrelevant because they pertain to the moot Ex parte Young question or (2) improper premature attempts to present Texas's defenses on the merits of the case, viz., Texas's Commerce Clause challenge to the ADA; and its Chevron challenge to the validity of the ADA regulation.

Furthermore, it is not necessary to address Texas's arguments in opposition to plaintiffs' Ex parte Young suit. The purpose of the doctrine of Ex parte Young is to allow plaintiffs asserting federal law claims to circumvent the state's sovereign immunity from suit by suing state officers instead. Home Telephone & Telegraph Co. v. City of Los Angeles, 227 U.S. 278 (1913); Ex parte Young, 209 U.S. 123 (1908). Because Texas has waived its immunity from suit in federal court in this case it is not necessary for the plaintiffs to invoke the Ex parte Young doctrine in order to prosecute their action against the defendants. Accordingly, there is no need for us to decide whether the doctrine would have been appropriate if Texas had not waived its immunity from suit.[28]

Thus, having decided the determinative issue of this appeal—that the federal district court has subject matter jurisdiction because Texas waived its immunity from suit by removal of this case to federal court—we will not address Texas's remaining arguments, which pertain to its defenses on the merits of the case, not raised below and prematurely presented here, viz., that the five dollar fee does not violate the statute or the regulation; that the regulation is invalid under Chevron; and that ADA Title II and the regulation are not authorized by the Commerce Clause, as limited by the Tenth Amendment. These matters may or may not contribute relevantly to Texas's defenses on the merits of the case, but they can have no bearing or effect on our determination that the federal district court has subject matter jurisdiction over this case.

For these reasons, the judgment of the district court is reversed, and the case is remanded for further proceedings consistent with

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28. See Pederson v. Louisiana State University, 213 F.3d 858, 875, n. 15 (5th Cir. 2000) ("Because we determine that LSU waived its Eleventh Amendment sovereign immunity, we will not address the two alternative arguments regarding abrogation of sovereign immunity, and the doctrine of Ex Parte Young.").

this opinion. We do not determine and the state is not precluded from pursuing a claim that it is immune from liability under principles of Texas sovereign immunity law, separate and apart from its waiver of its immunity from suit in federal court in this case.

IT IS SO ORDERED.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

MARJORIE MEYERS, by Next Friend EDGAR C. BENZING, HELEN ELKIN, RUTH H. DAVID and PHILLIP GREENBERG on behalf of themselves and all others similarly situated Plaintiffs	§	
vs.	§	**NO. 00 CA 430 SS**
STATE OF TEXAS, DEPARTMENT OF TRANSPORTATION, and WILLIAM G. BURNETT, Defendants	§	

ORDER

BE IT REMEMBERED on this the 16th /s/ day of April 2001 the Court reviewed the file in the above-captioned matter, specifically the Plaintiff's Motion to Remand [#10], its supporting Memorandum [#11], and Defendant's Motion to Dismiss [#4], and all respective responses and replies thereto, and thereafter entered the following order and opinion.

I. Procedural Background

Plaintiffs filed this class action in the 201st Judicial District Court of Travis County, Texas, on August 11, 1997. The state court petition set out a single legal claim grounded in the Americans with Disabilities Act ("ADA"), 42 U.S.C. §12101 *et seq.*, with the allegation that the State of Texas was in violation of the ADA with its policy on parking space placards for disabled individuals. Specifically, the plaintiffs allege Texas violates the ADA by charging its disabled citizens for the standardized "hang-tags" necessary to legally park in parking spaces reserved for the disabled. *State Record (hereinafter "SR") 11-12.* Based on this allegation, plaintiffs sought both reimbursement of the cost of purchasing the placard, and injunctive relief against future charges. *SR 11, 13.* The State responded to this original petition on September 8, 1997.

On September 10, 1997, the State attempted to remove the action to this Court by filing a Notice of Removal under the theory of federal question jurisdiction. The Court remanded this action to state court on November 25, 1997, upon finding the Tax Injunction Act barred federal jurisdiction over the fee charged by the State for the placard. In its amended answer in state court, the State specifically asserted — for the first time — the jurisdictional defenses based on Eleventh Amendment immunity in federal court and Tenth Amendment immunity in state court. Also, the State argued the ADA is unconstitutional as applied to defendants because Congress lacked the authority to abrogate defendants' immunity from suit under the ADA. *SR 671-72.*

On July 17, 2000, the State again filed a Notice of Removal with this Court. The new basis for removal cited by the State was the recent decision of the Fifth Circuit in *Neinast v. State of Texas* that removed the jurisdictional bar by finding the Tax Injunction Act was inapplicable to the placard fee charged by the State. 217 F.3d 275 (5th Cir. 2000). After removing the suit to this Court, the State filed a Motion to Dismiss, arguing that the plaintiffs' claims are based on a federal regulation — i.e., 28 C.F.R. § 35.130(f) — that cannot be constitutionally applied to the states. The plaintiffs, however, filed a Motion to Remand, claiming that dismissal was inappropriate (given the fact that the State was the removing party)

and that the claims could be litigated in state court. Both parties urged this Court to delay ruling on these motions because of a case presenting the issue of applicability of the ADA to states that was pending before the Court. On February 21, 2001, the Supreme Court issued its opinion in *Board of Trustees of the University of Alabama v. Garrett.* 121 S.Ct. 955 (2001). On February 26, 2001, the Supreme Court denied the writ of certiorari in *Neinast. Neinast v. Texas,* 121 S.Ct. 1188 (Feb. 26, 2001). After considering the legal ramifications of these recent decisions, the Court now enters its Order in the present case.

II. Discussion

A. Applicability of ADA to the State

Plaintiffs brought a class action lawsuit in state court, later removed to federal court by the State, claiming that the five dollar fee charged for the placard required to access parking spaces for the disabled. The key statutory provision cited by plaintiffs is promulgated by the Justice Department under Sections 12132 and 12134 of the ADA. The regulation states in relevant part:

> A public entity may not place a surcharge on a particular individual with a disability or any group of individuals with disabilities to cover the costs of measures, such as the provision of auxiliary aids or program accessibility, that are required to provide that individual or group with nondiscriminatory treatment required by the Act or this part.

28 C.F.R. §35.130(f). Before addressing the merits of plaintiffs' claim, the Court must address whether the ADA validly applies to the State in light of the Supreme Court's recent decision in *Garrett.*

In *Garrett,* the Supreme Court held that Title I of the Americans with Disabilities Act does not validly abrogate the state's sovereign immunity based on the Eleventh Amendment. 121 S.Ct. at 955. The Supreme Court also held that States are "not required by the Fourteenth Amendment to make special accommodations for the disabled, so long as their actions towards such individuals are rational." *Id.* at 964. In this case, the State

argues the five dollar fee charged to disabled individuals to access handicapped parking spaces is a reasonable fee to defray the costs of the parking placard program. *See Defendant's Motion to Dismiss,* at 1-2.

In Neinast, the Fifth Circuit decided the same issue presented in this case, albeit in a different procedural posture, and held the following: (1) the amount charged by the State for the handicapped placard was a "fee" and thus unaffected by the Tax Injunction Act; (2) the State did not waive its Eleventh Amendment immunity defense as it did not file an answer or "participate in any proceedings indicating intent to try matter on the merits"; and (3) the regulation prohibiting the State from imposing the handicapped parking placard fee did not validly abrogate the State's Eleventh Amendment immunity. *Neinast v. Texas,* 217 F.3d 275 (5th Cir. 2000), *cert. denied,* 121 S.Ct. 1188 (Feb. 26, 2001).

Applying *Garrett and Neinast* to the facts in the present case, the Court finds that plaintiffs' claims must be dismissed pursuant to the Eleventh Amendment. Plaintiffs' contend that Congress intended to abrogate the States' immunity from suit when enacting the ADA, but this abrogation is effective only when Congress is acting pursuant to a valid exercise of power. *See Kimel v. Florida Bd. of Regents*, 120 S.Ct. 631 (2000); *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Savings Bank,* 119 S.Ct. 2199 (1999). Furthermore, they argue that *Garrett* does not control the present case, as *Garrett* specifically dealt with only Title I of the ADA, and not Title II as is at issue in this Court. *Plaintiffs' Notice of Supplemental Authorities*, at 3.

The Court does not agree with this fine a reading of *Garrett.* Instead, the Court focuses on the rational basis analysis applied by the Supreme Court in *Garrett,* which held that state action that "rationally furthers the purpose identified by the State" is not violative of the Fourteenth Amendment. 121 S.Ct. at 963-64, *citing Cleburne v. Cleburne Living Center, Inc.,* 105 S.Ct. 3249 (1985). Also, the Court recognizes the doctrine of congruence and proportionality when considering the rights and remedies created by the ADA against the States, and finds that the remedy Title II would

provide to plaintiffs in this case fails this test. *Id.* at 966. The Supreme Court discusses at length the rigidity of the ADA and lack of regard for the rational basis test – this discussion is as appropriate to Title I as Title II of the Act. *Id.* (noting that the ADA "forbids 'utilizing standards, criteria, or methods of administration' that disparately impact the disabled, without regard to whether such conduct has a rational basis"). As did the *Garrett* court, this Court concludes that the ADA has serious "constitutional shortcomings" with regard to the valid exercise of congressional power, and thus holds that the ADA is invalid as applied to the State in this case. *Id.* at 967.

B. Waiver

While the Court agrees with the State in that dismissal is appropriate, it takes issue with the procedural tactics used by the State to achieve this result. The Eleventh Amendment does not automatically destroy original jurisdiction, but empowers the state to assert sovereign immunity defense if it chooses to do so. *Wisconsin Dep't of Corrections v. Schacht,* 118 S.Ct. 2047, 2052 (1998). It is well-settled law that a state's waiver of immunity must be unequivocal. *See, e.g., id; see also Neinast,* 217 F.3d at 279. A state may waive its immunity by two methods other than express renunciation: when the state avails itself of federal jurisdiction through asserting its own claims, or when it evidences an intent to defend the suit on the merits. *Neinast,* 217 F.3d at 279. In any case, the state cannot proceed past the motion and answer stage, and at the same time hold back its immunity defense. *Id.* This would effectively allow the state to have two proverbial bites at the apple if it were allowed to proceed on the merits and at the same time reserve the immunity defense for a later date.

The state has twice removed the present case to this Court. The first time, this Court remanded the case to state court for further proceedings; this time, the plaintiffs have again filed a motion to remand while the state wishes the Court to dismiss this lawsuit. Unlike the case in *Neinast,* in which the state was sued in federal court but was dismissed on a Rule 12(b)(6) motion, this case reaches federal court *because of the state's own decision to remove*

it to federal court. To allow the state to avail itself of federal court jurisdiction, and then seek a dismissal on Eleventh Amendment grounds, is surely not the intended consequence of *Schacht* and *Neinast,* but that is the result reached under current Eleventh Amendment jurisprudence.[1]

Accordingly, the Court enters the following:

IT IS ORDERED that the State's Motion to Dismiss [#4] is GRANTED and the Plaintiffs' Motion to Remand [#10] is DENIED;

IT IS FURTHER ORDERED that any and all remaining pending motions before this Court are DISMISSED AS MOOT.

SIGNED this the 16th /s/ day of April 2001.

UNITED STATES DISTRICT JUDGE

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1. The Court notes the insightful concurring opinion of Justice Kennedy in *Schacht* on the issue of asserting Eleventh Amendment immunity after removing to federal court:

> This is the situation in which law usually says a party must accept the consequences of its own acts. It would seem simple enough to rule that once a State consents to removal, it may not turn around and say the Eleventh Amendment bars the jurisdiction of the federal court.

Wisconsin Dep 't of Corrections v. Schacht, 118 S.Ct. at 2055 (1998) (Kennedy, J., concurring). However, the issue was not squarely before the Court, and there is yet no clear guidance from the Court on whether removal alone constitutes waiver of Eleventh Amendment immunity.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

[Illegible File Stamp]

mxc

MARJORIE MEYERS,	§	
by Next Friend	§	
EDGAR C. BENZING,	§	
HELEN ELKIN,	§	
RUTH H. DAVID and	§	
PHILLIP GREENBERG	§	
on behalf of themselves and	§	
all others similarly situated	§	
Plaintiffs	§	
vs.	§	**NO. 00 CA 430 SS**
	§	
STATE OF TEXAS,	§	
DEPARTMENT OF	§	
TRANSPORTATION, and	§	
WILLIAM G. BURNETT,	§	
Defendants	§	

ORDER OF DISMISSAL

BE IT REMEMBERED on this the 16th /s/ day of April 2001, the Court entered its Order granting the Defendants' Motion to Dismiss, and now enters the following order:

IT IS ORDERED, ADJUDGED, and DECREED that plaintiffs' claims against defendants in the above-styled cause are DISMISSED WITHOUT PREJUDICE with the costs in this case to be borne by the party incurring the same.

SIGNED this the 16th /s/ day of April 2001.

Sam Sparks /s/
SAM PARKS
UNITED STATES DISTRICT JUDGE

FILED

MAR 12 2002
CLERK, U.S. DISTRICT COURT
WESTERN DISTRICT OF TEXAS
BY /s/
DEPUTY CLERK

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

MARJORIE MEYERS, by	§	
Next Friend EDGAR C.	§	
BENZING, HELEN ELKIN,	§	
RUTH H. DAVID and	§	
PHILLIP GREENBERG,	§	
on behalf of themselves and	§	
all others similarly situated,	§	
Plaintiffs	§	
	§	
vs.	§	**NO. 00 CA 430 SS**
	§	
STATE OF TEXAS,	§	
DEPARTMENT OF	§	
TRANSPORTATION, and	§	
WILLIAM G. BURNETT,	§	
Defendants	§	

ORDER

Before the Court are the Motion and Memorandum to Alter or Amend Judgment [#37] filed by plaintiffs Marjorie Meyers, et al., on behalf of themselves and all others similarly situated, and defendants' response thereto [#59]. After reviewing the pleadings

before the Court, the case record, and the applicable law, the Court thereafter enters the following order and opinion.

I. Background

Plaintiffs filed this class action lawsuit seeking injunctive and monetary relief alleging the State of Texas is in violation of the Americans with Disabilities Act (ADA) through its policy on parking space placards for disabled individuals. *See* 42 U.S.C. § 12101 *et seq.* Specifically, plaintiffs allege Texas violates the ADA by charging its disabled citizens for the standardized "hang-tags" necessary to legally park in parking spaces reserved for the disabled. On April 16, 2001, the Court entered its Order dismissing without prejudice plaintiffs' claims based on recent decisions by the Fifth Circuit and the Supreme Court as to whether the ADA validly abrogates the sovereign immunity of states based on Eleventh Amendment immunity.[1]

Plaintiffs now request the Court to alter or amend its earlier judgment to allow at least claims seeking declaratory and injunctive relief under Title II of the ADA. In their briefing and supplemental authority to the Court, plaintiffs rely heavily on footnote 9 in *Garrett* that left open the issue of whether Title II represents a valid exercise of congressional power under Section 5 of Fourteenth Amendment and thus would abrogate state sovereign immunity under Eleventh Amendment. Furthermore, plaintiffs request the

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1. *See Board of Trustees of the University of Alabama v. Garrett*, 121 S.Ct. 955, 964 (2001) (finding that Title I of the ADA does not validly abrogate the state's sovereign immunity and that states are "not required by the Fourteenth Amendment to make special accommodations for the disabled, so long as their actions towards such individuals are rational"); *Neinast v. Texas*, 217 F.3d 275 (5th Cir. 2000) (holding that the ADA unconstitutionally exceeded Congress' § 5 authority and may not be enforced against the state).

Court to reconsider its earlier holding that the State had not waived its Eleventh Amendment immunity by removing the case to federal court. *See April 16, 2001 Order* at 5-6. In response, defendants contend the Court was correct in its April 16, 2001 order in dismissing plaintiffs' claims based on Eleventh Amendment immunity and the controlling case law.

II. Discussion

Were the validity of Title II of the ADA an issue of first impression in this Circuit, this Court would lend greater weight to plaintiffs' arguments regarding the inapplicability of *Garrett* in this case. The Supreme Court in *Garrett* specifically declined to address the validity of Title II, and the Fifth Circuit had refrained from addressing the issue squarely until recently. *See Shaboon v. Duncan*, 252 F.3d 722, 737 (5th Cir. 2001). In December 2001, after parties had filed their briefs on the effect of *Garrett* and *Neinast* with regard to the plaintiffs' motion to amend the judgment, the Fifth Circuit expressly ruled on the validity of Title II of the ADA in *Reickenbacker v. Foster*, 274 F.3d 974 (5th Cir. 2001). In *Reickenbacker*, a class of mentally ill prisoners filed suit against the Louisiana Department of Public Safety and Corrections and various state officers under Title II of the ADA. *Reickenbacker*, 274 F.3d at 976. After the district court denied. defendants' motion to dismiss, the Fifth Circuit reversed, holding: (1) the exception to Eleventh Amendment immunity created by *Ex parte Young* was not available to plaintiffs even if the original complaint named individual state officials, and (2) Title II of the ADA was not a valid exercise of congressional authority under Section 5 of the Fourteenth Amendment, and therefore did not abrogate the state's sovereign immunity under the Eleventh Amendment. *Id.* at 981. In light of this clear Circuit precedent, the Court stands by its ruling in its April 16, 2001 Order that Title II of the ADA has "serious 'constitutional shortcomings'" and is invalid

as applied to the state in this case. *April 16, 2001 Order,* at 5, *citing Garrett,* 121 S.Ct. at 967.

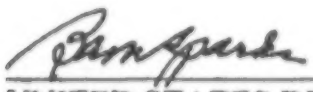
Plaintiffs also argue that remand, and not dismissal, is the proper course of action if plaintiffs' claims are barred by the Eleventh Amendment. *See Plaintiffs ' Motion to Alter or Amend Judgment,* at 4-5, *citing International Primate Protection League v. Administrators of Tulane Ed. Fund,* 111 S.Ct. 1700 (1991). Defendants, of course, vigorously oppose plaintiffs' assertion that remand is appropriate in this instance. In its April 16, 2001 Order, the Court dismissed plaintiffs' claims because the ADA was an invalid exercise of congressional power, and thus was invalid as applied to the state. *April 16, 2001 Order*, at 5. The Court fails to see how it can remand plaintiffs' claims to state court when the provision of the ADA under which plaintiffs seek relief has been struck down as unconstitutional by prevailing case law. *See Reickenbacker,* 274 F.3d at 981. Accordingly, the Court declines to amend its earlier order dismissing plaintiffs' claims.

Finally, the Court addresses plaintiffs' continued assertion that defendants waived their Eleventh Amendment immunity by removing the instant case to federal court. As the Court explained in its earlier order, it does not endorse the "hide and seek" procedural tactics employed by defendants to first remove a case to federal court and then seek dismissal under the Eleventh Amendment. *April 16, 2001 Order*, at 6. At the same time, no controlling appellate court has closed this procedural loophole used by the state to escape both state and federal jurisdiction. *Cf. Wisconsin Dep't of Corrections v. Schacht,* 118 S.Ct. 2047 (1998); *Neinast,* 217 F.3d at 279. Plaintiffs' request to reconsider the Court's earlier holding with regard to waiver is therefore denied.

In accordance with the foregoing discussion, the Court enters the following:

IT IS ORDERED that Plaintiffs' Motion and Memorandum to Alter or Amend Judgment [#37] is DENIED.

SIGNED this the 12th /s/ day of March 2002.



UNITED STATES DISTRICT JUDGE

United States Court of Appeals
Fifth Circuit
F I L E D
June 29, 2006
Charles R. Fulbruge III
Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 02-50452

MARJORIE MEYERS, by Next Friend Edgar C. Benning, on behalf of herself and all others similarly situated; HELEN ELKIN, on behalf of herself and all others similarly situated; RUTH H. DAVIS, on behalf of herself and all others similarly situated; PHILLIP GREENBERG, on behalf of himself and all others similarly situated,

Plaintiffs-Appellants,

VERSUS

STATE OF TEXAS; TEXAS DEPARTMENT OF TRANSPORTATION; WILLIAM G. BURNETT, Executive Director of the Texas Department of Transportation,

Defendants-Appellees.

Appeal from the United States District Court
For the Western District of Texas

ON PETITION FOR REHEARING

Before WIENER, BENAVIDES, and DENNIS, Circuit Judges.

DENNIS, Circuit Judge:

Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

The narrow holding in the instant case is that, under the Supreme Court's decision in Lapides v. Bd. of Regents of Georgia, 535 U.S. 613, 122 S.Ct. 1640 (2002), when a State removes to federal court a private state court suit based on a federal-law claim, it invokes federal jurisdiction and thus waives its unqualified right to object peremptorily to the federal district court's jurisdiction on the ground of state sovereign immunity. However, that waiver does not affect or limit the State's ability to assert whatever rights, immunities or defenses are provided For by its own sovereign immunity law to defeat the claims against the State finally and on their merits in the federal courts. In sum, Texas may assert its state sovereign immunity as defined by its own law as a defense against the plaintiffs' claims in the federal courts, but it may not use it to defeat federal jurisdiction or as a return ticket back to the state court system. Additionally, the panel opinion does not reach or decide, but remands for further proceedings, the issues of whether the ADA Title II on its face or as applied constitutionally abrogates the State's sovereign immunity; whether the plaintiffs failed to state a claim based on a violation of Title II or the regulation; whether the regulation sued upon is invalid under Chevron USA Inc v. NRDC,

467 US 837, 104 S.Ct. 2778 (1984); and whether the Commerce Clause authorizes the enactment of ADA Title II.

IT IS SO ORDERED.

(3)

No. 06-462

FILED
MAR 2 3 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The Supreme Court of the United States

STATE OF TEXAS, TEXAS DEPARTMENT OF TRANSPORTATION, and MICHAEL W. BEHRENS in his capacity as Executive Director of the Texas Department of Transportation,

Petitioners,

vs.

MARJORIE MEYERS, HELEN ELKIN, RUTH H. DAVIS, and PHILLIP GREENBERG on behalf of themselves and all others similarly situated, and the UNITED STATES OF AMERICA,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Under the particular circumstances of this case, is a State immune from suit on claims the State removed to federal court, even though the State would not have been immune on the same claims had the case remained in state court?

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STATEMENT OF THE CASE

Marjorie Meyers, Helen Elkin, Ruth H. Davis, and Phillip Greenberg ("Respondents"), are individuals with serious mobility impairments who have paid for placards allowing use of accessible parking. In order to receive such placards, Respondents are required by Texas law to pay a fee. Respondents contend that requiring a fee for placards allowing use of accessible parking violates Title II of the Americans With Disabilities Act, 42 U.S.C. § 12132 ("Title II").[1]

Respondents filed suit in state court challenging the fee requirement for placards. In September of 1997, Petitioners removed the case to the United States District Court for the Western District of Texas. The federal court sua sponte remanded the action to state court on the ground that the placard fee is a state tax, and that federal jurisdiction was therefore barred by the Tax Injunction Act, 28 U.S.C. § 1341.

Back in state court, class certification was granted, and Petitioners' claim that the case was barred by sovereign immunity was rejected by the state trial court. Petitioners appealed these rulings to Texas' Third District Court of Appeals, where the case was briefed and oral argument scheduled. Before oral argument, on July 17, 2000 – nearly three years after suit was originally filed and over two years after the federal court's first order of remand to state court – Petitioners removed the case to

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[1] Accord *Klingler v. Department of Revenue*, 455 F.3d 888 (8th Cir. 2006); *Dare v. California*, 191 F.3d 1167 (9th Cir. 1999), *cert. denied*, 531 U.S. 1190 (2001); *Duprey v. Connecticut*, 23 F.Supp.2d 702 (D. Conn. 1998); *Thrope v. Ohio*, 19 F.Supp.2d 816 (S.D. Ohio 1998).

federal court for the second time. The basis asserted for the second removal was a ruling by the Fifth Circuit in a separate lawsuit, *Neinast v. Texas*, 217 F.3d 275 (5th Cir. 2000), that the placard fee is not a tax.

Two days later, Petitioners moved to dismiss Respondents' claims as barred by the Eleventh Amendment to the Constitution of the United States. Respondents moved for remand, arguing that Petitioners' second removal of a previously removed and remanded case, taken over three years after suit was filed, and based on events external to the litigation, was improper. On April 16, 2001, the district court granted Petitioners' motion to dismiss.

On May 19, 2005, the Fifth Circuit reversed, relying on the holding in *Lapides v. Bd. of Regents*, 535 U.S. 613 (2002), that Eleventh Amendment immunity from suit in federal court is waived by a state's decision to remove. (Pet. App. at 1-35). The Fifth Circuit rejected Petitioners' argument that *Lapides* should be narrowly limited to state law claims for which the state has waived its immunity. (Pet. App. at 9-23).

In denying Petitioners' motion for rehearing, the Fifth Circuit emphasized the limited nature of its ruling:

> The narrow holding in the instant case is that, under the Supreme Court's decision in *Lapides v. Bd. of Regents of Georgia*, 535 U.S. 613, 122 S.Ct. 1640 (2002), when a State removes to federal court a private state court suit based on a federal-law claim, it invokes federal jurisdiction and thus waives its unqualified right to object peremptorily to the federal district court's jurisdiction on the ground of state sovereign immunity. However, that waiver does not affect or limit the State's ability to assert whatever rights,

> immunities or defenses are provided for by its own sovereign immunity law to defeat the claims against the State finally and on their merits in the federal courts. In sum, Texas may assert its state sovereign immunity defense as defined by its own law as a defense against the plaintiffs' claims in the federal courts, but it may not use it to defeat federal jurisdiction or as a return ticket back to the state court system.

(Pet. App. at 50).

REASONS FOR DENYING THE WRIT

In *Lapides*, this Court unanimously announced the "clear" and "easily applied" rule that "removal is a form of voluntary invocation of a federal forum court's jurisdiction sufficient to waive the State's otherwise valid objection to litigation of a matter (here of state law) in a federal forum." 535 U.S. at 623-24. *Lapides* relied on a line of precedent concluding that Eleventh Amendment immunity is waived when a State invokes federal jurisdiction. *Id.* at 619-22. The Court was concerned that a State should not be permitted to invoke federal jurisdiction and simultaneously reject federal authority, and that unfairness would result from a different rule. *Id.* at 622-23. See also *Wisconsin Dep't of Corrections v. Schacht*, 524 U.S. 381, 393 (1998) (Kennedy, J., concurring).

Petitioners seek review to resolve an alleged circuit conflict regarding the scope of waiver by removal. The petition and the case law often confusingly refer to sovereign immunity generally, without distinguishing between a State's immunity from suit in federal court as protected by the Eleventh Amendment (sometimes referred to as

forum immunity), and the sovereign immunity that a State typically enjoys, even in its own state courts, as a matter of state sovereign immunity law. To understand why this case is not worthy of review, it is important to bear in mind the distinction between these two forms of immunity.

Petitioners' primary argument for review is that the decisions below conflict with decisions of the Fourth, Seventh, and D.C. Circuits. But the Fifth Circuit's decisions below do not conflict with any of the cases cited. All of the circuit decisions cited by Petitioners can readily be harmonized to honor one abiding principle: A State waives its federal forum immunity by removal to federal court, but does not lose its ability to assert any immunity defenses it would otherwise have had available if the case had remained in state court. To the limited extent that some circuits have expressed differing views regarding *Lapides*, the variations arise from dicta, from ambiguous passages, or are semantic in nature, and in any event have yet to prove outcome-determinative in any case. Because there is no direct conflict between the decisions below and any other court of appeals decision, Petitioners' primary argument for review fails.

Moreover, this case is not an ideal vehicle for deciding the question presented. First, the claims in this case would not be barred by sovereign immunity in state court, and so the question stated by the Petitioners is not presented. Even if Petitioners wish to assert a claim of immunity as a matter of Texas sovereign immunity law, the decision of the Fifth Circuit in its order on rehearing expressly preserves Petitioners' ability to assert such immunity as a defense in the federal court on remand. (Pet. App. at 50).

In addition, there is an antecedent jurisdictional issue regarding whether a second removal, years after the commencement of the action, and based solely upon a court decision in a separate suit, is a proper method of invoking federal jurisdiction. The second removal and subsequent delay and additional expense of litigation, added to the fact that Petitioners effectively seek reversal of a state court ruling that there is no sovereign immunity from Respondents' claims, heightens the unfairness concerns referenced in *Lapides* and renders this case atypical from run-of-the-mill removals. It also bears mention that the case as presently postured is interlocutory, and there is no momentous reason to rush forward Supreme Court review of a constitutional issue where the case may likely be resolved without need for such review.

Finally, the ultimate resolution of Petitioners' contentions would benefit from further review by the district and circuit courts, and time for informed commentary. Allowing percolation of this area of law presents no unfairness, as any state agency subjects itself to this issue only if it makes the voluntary decision to remove a case from its own state court system into federal court. And as the purported conflict does not appear likely to affect the ultimate result in any case, there is no prejudice to any state agency. For these reasons, this case does not present a matter of such tremendous consequence as to require consideration so soon after *Lapides*.

I. THERE IS NO CONFLICT

Petitioners' depiction of a conflict among the circuits does not withstand scrutiny. Petitioners argue that the Fourth, Seventh, and D.C. Circuits limit waiver-by-removal to state-law claims from which the state has waived its immunity in state court, and that in contrast the Fifth, Ninth, and Tenth Circuits hold "that a State's removal waives its immunity from suit *in toto* – *i.e.*, its forum immunity plus the entirety of its underlying sovereign immunity." (Pet. at 7). A careful review of the cited circuit decisions, however, demonstrates that none are in clear and direct conflict with the decisions below, and that no circuit court has stated that waiver by removal extends beyond forum immunity to include waiver of immunity a State would otherwise enjoy in state court. There is no conflict.

The earliest case cited by Petitioners for the purported limited view of waiver by removal is *Watters v. Washington Metro. Area Transit Auth'y*, 295 F.3d 36, 42 n.13 (D.C. Cir. 2002). But in *Watters*, the D.C. Circuit did not reach the issue, because it had not been raised. As the opinion concludes in its footnote reference to the issue: "we see no reason to consider, sua sponte, an issue upon which neither this circuit nor the Supreme Court has yet opined." *Id.* An opinion which merely recognizes and declines to reach an issue is no proper basis for finding a conflict on the very issue which the opinion expressly declined to reach.

Omosegbon v. Wells, 335 F.3d 668, 673 (7th Cir. 2003), also involves claims under state law for which sovereign immunity had been abolished. *Id.* at 672-73. The issue in *Omosegbon* was exactly the same (state-law claims for

which sovereign immunity had been waived as a matter of state law) as the issue in *Lapides*. Given the perfect identity of the issue presented in *Omosegbon* with the issue resolved in *Lapides*, any suggestion in *Omosegbon* of a narrow interpretation of *Lapides* necessarily constitutes dicta, and is therefore not an appropriate basis for review by this Court.

In any event, the language from *Omosegbon* emphasized by Petitioners is best read as recognizing that *Lapides* directly controls only in cases involving claims for which immunity had been waived and so would present no bar in state court. *Id.* at 673 ("Before we find the rule announced in *Lapides* to be controlling here, we must first satisfy ourselves that Indiana's state-law immunity rules would have allowed an Indiana court to hear Dele's state-law contract claim had this lawsuit not been removed to federal court."). Although Petitioners read this passage as indicating there would be no waiver otherwise, the Seventh Circuit does not state such a conclusion. Instead, the passage is most naturally read as meaning that if the state law claims were barred in state court, then the case would not be on all-fours with *Lapides*, and it would then be necessary to consider how *Lapides* applies. Because *Lapides* was found to be indistinguishable on the facts before it, the Seventh Circuit did not need to undertake this inquiry in *Omosegbon*.

The final circuit decision cited by Petitioners for the limited-waiver side of the alleged conflict is *Stewart v. North Carolina*, 393 F.3d 484 (4th Cir. 2004). *Stewart* considered the application of *Lapides* to claims arising under state law which, in state court, would be barred by state-law sovereign immunity. *Id.* at 490. The Fourth Circuit concluded that: "by removing the case to federal

court and then invoking sovereign immunity[,] North Carolina did not seek to *regain* immunity that it had abandoned previously. Instead, North Carolina merely sought to have the sovereign immunity issue resolved by a federal court rather than a state court." *Id.* Thus, *Stewart* stands for the unremarkable conclusion that a State is entitled to dismissal after removal if the claim is found on motion to dismiss to be barred by state sovereign immunity law that would have barred the claim in state court.

The rulings below do not conflict with *Stewart*. The present case involves claims that would not be barred in state court by Texas sovereign immunity law, whereas *Stewart* involved claims that would have been barred in state court by North Carolina sovereign immunity law. *Stewart* and the decisions below are entirely consistent in their ultimate outcomes in that under either authority state law sovereign immunity defenses (as opposed to Eleventh Amendment forum immunity) are not waived by removal. Under both authorities, state-law sovereign immunity issues may be decided in the federal court after removal in the same manner as such defenses would have been resolved had the case remained in state court. The Fifth Circuit made clear that waiver by removal: "does not affect or limit the State's ability to assert whatever rights, immunities or defenses are provided for by its own sovereign immunity law. . . ." (Pet. App. at 50). Thus, on the essential question presented by the conflict alleged in the petition – whether sovereign immunity as a matter of state law is waived in addition to forum immunity under the Eleventh Amendment – *Stewart* and the decisions below are in perfect accord.

The topics on which the Fifth Circuit took issue with *Stewart*'s rationale amount to semantics and nuances,

rather than the ultimate holdings in the cases. Petitioners take comfort in the Fifth Circuit's broad statement that *Stewart*'s "rationale misconstrues important principles animating *Lapides*." (Pet. App. at 21). But an examination of the examples given for this statement reveal difference only in semantics, rather than any kind of true conflict which might provide a basis for certiorari review. For one, the Fifth Circuit disapproved of the *Stewart* court's statement that a State is "like any other defendant." (Pet. App. at 21). This statement is criticized because other defendants lack the sovereign immunity protections that are, as recognized in *Lapides*, subject to abuse by state agencies. *Id.* The Fifth Circuit also disapproved the suggestion in *Stewart* that a state defendant's motivation is relevant to the consideration of whether there is a waiver, because the motive for removal was rejected as a relevant factor in *Lapides*. (Pet. App. at 22). The Fifth Circuit reads *Stewart* as countenancing "the waiver-by-removal rule as focused only on specific or comparative abuses such as attempting to 'regain' an 'abandoned' immunity." *Id.*

The differences reflected by these passages, and on which Petitioners' dire warnings depend, do not constitute a disagreement of sufficient substance to warrant review. A disagreement which is merely semantic or purely theoretical, and which does not lead to differing results, is not of sufficient moment to justify certiorari review. Both courts ultimately agree that removal waives only forum immunity, and that claims barred under state sovereign immunity law will continue to be barred by the same law after removal to federal court. Because *Meyers* and *Stewart* are so readily harmonized, no basis for granting certiorari to resolve conflict is presented.

The petition also cites *Embury v. King*, 361 F.3d 562 (9th Cir. 2004), as holding that waiver by removal extends to all claims generally. However, *Embury* does not indicate that state law sovereign immunity, as opposed to forum immunity under the Eleventh Amendment, is waived by removal. Indeed, *Embury* carefully reserved the question of whether a removing state defendant would be immune from federal claims if Congress had failed to constitutionally abrogate a State's immunity as to such claims. *Id.* at 566 n.20. Thus, the Ninth Circuit has not ruled that such substantive defenses (as opposed to forum immunity) are waived by removal.

It is also possible to read *Estes v. Wyoming Dep't of Transp.*, 302 F.3d 1200 (10th Cir. 2002) as using "sovereign immunity" as a commonly employed federal shorthand for forum immunity as protected by the Eleventh Amendment, exclusive of sovereign immunity as protected in state court under state law. Because it is not clear from *Estes* whether the Wyoming Department of Transportation asserted a claim of state-law sovereign immunity that would have been enforceable in state court, *Estes* also fails to establish a conflict regarding whether removal waives anything more than forum immunity.

In summary, Petitioners' claim of a "clear and deep" conflict (Pet. at 6) fails to withstand a careful reading of the authorities cited in the Petition. The circuit decisions issued since *Lapides* agree that removal waives forum immunity, but removal does not waive immunity that a State defendant would have enjoyed as a matter of state law in state court. Because there is no conflict, review should be denied.

II. THIS CASE IS AN UNSUITABLE VEHICLE FOR REVIEW

Even if there were conflict on the question presented, this case would be a poor vehicle for addressing the issue.

First, the question as stated in the petition is not properly presented in this case because in Texas state court Petitioners would have no immunity from Respondents' claims. Among other reasons why immunity would be no barrier in state court, Respondents' claims come within an established exception to sovereign immunity under Texas law allowing recovery of illegally collected fees. See *Austin Nat'l Bank v. Sheppard*, 123 Tex. 272, 71 S.W.2d 242, 246 (1934); *Camacho v. Samaniego*, 954 S.W.2d 811, 822 (Tex. App. – El Paso 1997).

The unsuitability of this case for resolving the question stated in the petition mirrors the unsuitability of *Lapides* to resolve issues beyond those presented by the particular circumstances presented in that case. *Lapides* directly controls cases in which no immunity would have applied in state court simply because that was the situation there presented. *Lapides*, 535 U.S. at 617 ("we must limit our answer to the context of state law claims, in respect to which the State has explicitly waived immunity from state-court proceedings"). Supreme Court review of the decisions below would present no opportunity to address the extent of waiver where a State would have been immune in state court because – just as in *Lapides* – Respondents' claims would not be barred by immunity in state court. Because there would be no state-law sovereign immunity barrier had Respondents' claim remained in state court, it would not be appropriate to use this case to

consider the effect of removal on claims that would otherwise be barred in state court.

Second, even if Petitioners argue that they would have been protected by immunity in state court and should not lose that immunity by removal, the Fifth Circuit's decisions expressly allow them to make this argument on remand in federal court. (Pet App. at 50). Petitioners may present whatever immunity defenses that would have been available to them in state court, although the cases cited above and the prior decision of the state court denying the plea to jurisdiction indicate that these defenses will not prevail. Accordingly, Petitioners have not lost any immunity defense that would have applied in state court, which is the linchpin of their argument for review.

Third, there is a difficult antecedent question regarding whether a second removal – taken after an earlier removal and remand and well beyond the thirty day period specified for removal – can effectively establish jurisdiction in federal court. The Fifth Circuit allows a second removal to be taken when subsequent pleadings or events reveal a new ground for removal, and such events warranting an otherwise untimely removal may include an order entered in a separate lawsuit. See *Green v. R.J. Reynolds Tobacco Co.*, 274 F.3d 263 (5th Cir. 2001). The separate order prompting Petitioners to remove this case prior to oral argument in the Texas appellate court was a decision of the Fifth Circuit in a separate challenge to the placard fee, involving different Plaintiffs and different lawyers from the Respondents and lawyers in this case. *Neinast*, 217 F.3d at 279. In contrast with the Fifth Circuit, most courts have concluded that a court decision in a separate case does not provide an appropriate basis for reopening the opportunity to remove to federal court. See,

e.g., *Peabody v. Maud Van Cortland Hill Schroll Trust*, 892 F.2d 772, 775 (9th Cir. 1990); *Kocaj v. Chrysler Corp.*, 794 F.Supp. 234 (E.D. Mich. 1992); *Johansen v. Employee Benefit Claims, Inc.*, 668 F.Supp. 1294, 1297 (D. Minn. 1987); *Holiday v. Travelers Ins. Co.*, 666 F.Supp. 1286, 1290 (D. Minn. 1987). Because this presents a significant question involving the district court's removal jurisdiction, it should be addressed prior to reaching the question presented by the petition. See, e.g., *Bender v. Williamsport Sch. Dist.*, 475 U.S. 534 (1986). Unless this Court wishes to take on that jurisdictional question, it should deny review here.

Finally, the ricocheting that Respondents have suffered in being pulled from state to federal to state court, prevailing on key issues in state court, briefing those issues for anticipated success on appeal, and then being again removed to federal court shortly before the oral argument date in the state appellate court, followed by a dismissal from federal court, infuses this case with heightened grounds for concern over fairness and gamesmanship as discussed in *Lapides*, 535 U.S. at 619, 622, and in Justice Kennedy's concurring opinion in *Schacht*, 524 U.S. at 393-95. Respondents have suffered extraordinary delay and expense, and are forced to re-argue issues (sovereign immunity) on which Respondents had previously prevailed in state court. These circumstances render this case highly atypical, and therefore an unsuitable vehicle for Supreme Court review.

III. THERE IS NO PRESSING NEED FOR PRECIPITOUS REVIEW OF THE QUESTION PRESENTED

Contrary to the arguments made by Petitioners and their amici, there is no pressing need for immediate resolution of the uncertainties, if any, regarding the scope of *Lapides*. As discussed above in Section I, federal appellate decisions to date are easily harmonized to the effect that a State preserves the immunities it would enjoy in state court after removal, but loses its ability to assert forum immunity. We have found no case in which a federal court has clearly disallowed, solely because of removal, an immunity defense that would have been effective in state court.

States can easily avoid the risk from any uncertainty they perceive simply by defending themselves in their own state courts. Because the issue is raised only by voluntary action of the removing state agency, it is wholly within their power to avoid whatever injustice or potential for error that Petitioners and the amici believe may be risked by removal to federal court.

Because immunity defenses available in state court may be asserted in federal court after removal, there is no substantial prejudice suffered by state agency defendants who decide to remove. To the extent there is any difference in rationale among the Circuits, it would be advantageous to see if the law continues to evolve harmoniously. Thus far, nothing approaching the chaotic situation portrayed by Petitioners and amici has materialized.

This Court's decision in *Lapides* is only five years old. Since then, there have been no disagreements in the decisions of the Court of Appeals presenting any risk of differing outcomes in any particular case. For now, it

would be prudent to allow time for additional decisional authorities and informed commentary to guide this Court's ultimate review, and only then would review of the issue be prudent.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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In the Supreme Court of the United States

STATE OF TEXAS, ET AL., PETITIONERS

v.

MARJORIE MEYERS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals properly held that the State's removal of a case to federal court waives the State's immunity from suit in federal court, but not any other aspect of its sovereign immunity, including its substantive immunity from liability.

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In the Supreme Court of the United States

No. 06-462

STATE OF TEXAS, ET AL., PETITIONERS

v.

MARJORIE MEYERS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-35) is reported at 410 F.3d 236. The order of the court of appeals denying the petition for rehearing (Pet. App. 49-51) is reported at 454 F.3d 503. The orders of the district court dismissing the case for lack of jurisdiction (Pet. App. 36-41), and denying the motion to alter or amend the judgment (Pet. App. 44-48), are unreported.

JURISDICTION

The court of appeals entered its judgment on May 19, 2005. A petition for rehearing was denied on June 29, 2006 (Pet. App. 49-51). The petition for a writ of certiorari was filed on September 27, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. The Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. 12101 et *seq.*, established a "comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. 12101(b)(1). Congress found that, "historically, society has tended to isolate and segregate individuals with disabilities," and that "such forms of discrimination * * * continue to be a serious and pervasive social problem." 42 U.S.C. 12101(a)(2). Congress specifically found that discrimination against persons with disabilities "persists in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services." 42 U.S.C. 12101(a)(3).

In addition, Congress found that persons with disabilities

> continually encounter various forms of discrimination, including outright intentional exclusion, the discriminatory effects of architectural, transportation, and communication barriers, overprotective rules and policies, failure to make modifications to existing facilities and practices, exclusionary qualification standards and criteria, segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities.

42 U.S.C. 12101(a)(5). Congress concluded that persons with disabilities

> have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political power-

> lessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society.

42 U.S.C. 12101(a)(7). Based on those findings, Congress "invoke[d] the sweep of congressional authority, including the power to enforce the fourteenth amendment" to enact the ADA. 42 U.S.C. 12101(b)(4).

The ADA targets three particular areas of discrimination against persons with disabilities. Title I, 42 U.S.C. 12111-12117, addresses discrimination by employers affecting interstate commerce; Title II, 42 U.S.C. 12131-12165, addresses discrimination by governmental entities in the operation of public services, programs, and activities, including transportation; and Title III, 42 U.S.C. 12181-12189, addresses discrimination in public accommodations operated by private entities. This case arises under Title II of the ADA, which provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. 12132. A "public entity" is defined to include "any State or local government" and its components. 42 U.S.C. 12131(1)(A) and (B). Title II may be enforced through private suits against public entities. 42 U.S.C. 12133. Congress expressly abrogated the States' Eleventh Amendment immunity to private suits in federal court. 42 U.S.C. 12202.

b. Congress charged the Attorney General with issuing regulations to implement the provisions of Title II. See 42 U.S.C. 12134(a); see generally 28 C.F.R. Pt. 35. Those regulations, Congress further directed, "shall

include standards applicable to facilities and vehicles covered by this part" that are "consistent with the minimum guidelines and requirements issued by the Architectural and Transportation Barriers Compliance Board." 42 U.S.C. 12134(c). To ensure that newly constructed facilities are accessible to people with disabilities, the regulations require that, "[i]f parking spaces are provided for self-parking by employees or visitors, or both, then accessible spaces * * * shall be provided in each such parking area" in a number proportional to the number of total parking spaces. 28 C.F.R. Pt. 36 App. A, § 4.1.2(5); see 28 C.F.R. 35.151(c) (incorporating standards).[1] Each space must be "designated as reserved by a sign showing the symbol of accessibility." 28 C.F.R. Pt. 36, App. A, §4.6.4. Accessible parking must also be provided in existing facilities when necessary to assure that programs, services, and activities of an entity are accessible to people with disabilities. See 28 C.F.R. 35.150.

At issue in this case is a general regulatory prohibition that forbids public entities from "plac[ing] a surcharge on a particular individual with a disability or any group of individuals with disabilities to cover the costs of measures, such as the provision of auxiliary aids or program accessibility, that are required to provide that individual or group with the nondiscriminatory treat-

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[1] The regulations permit public entities subject to Title II to select between those standards and the Uniform Federal Accessibility Standards, 41 C.F.R. Pt. 101-19, Subpt. 101-19.6, App. A (2002). See 28 C.F.R. 35.151(c). With respect to parking requirements, the two sets of standards are virtually identical. See 41 C.F.R. Pt. 101-19, Subpt. 101-19.6, App. A, § 4.1.1(5) (2002); 41 C.F.R. 102-76.65 (adopting 36 C.F.R. Pt. 1191, App. C, § 208.2).

ment required by the Act or this part." 28 C.F.R. 35.130(f).

2. In order to provide access to handicap parking spaces, Texas law provides qualifying drivers handicap license plates at the same price that is charged for all other license plates issued by the State. Individuals with disabilities who do not drive or who otherwise desire a portable means of access to handicap parking spots can obtain a handicap parking placard. To obtain such a placard, however, state law requires individuals to pay a fee of $5 and to renew the placards every four years. Funds collected from the fees are deposited in the state highway fund to defray the cost of providing the placards. Pet. App. 3; Tex. Transp. Code Ann. §§ 681.002, 681.005 (West 1999); *id.* § 681.003 (Supp. 2006); see generally *Neinast* v. *Texas*, 217 F.3d 275, 277 (5th Cir. 2000), cert. denied, 531 U.S. 1190 (2001).

Marjorie Meyers and three other named plaintiffs (collectively, "Meyers") filed a class action lawsuit in Texas state court challenging the placard fee as violating Title II of the ADA and the regulation prohibiting the imposition of surcharges, 28 C.F.R. 35.130(f). Petitioners removed the case to federal court, see 28 U.S.C. 1441 (2000 & Supp. IV 2004); 28 U.S.C. 1446, but the district court remanded the case on the ground that the Tax Injunction Act, 28 U.S.C. 1341, barred federal jurisdiction. The Texas state court then denied petitioners' motion to dismiss on sovereign immunity grounds, holding that Title II validly abrogated "all state immunities." Pet. App. 3-4; *Meyers* v. *Texas*, No. 97-09093 (Tex. Dist. Ct. Mar. 28, 2000), slip op. 7-8.

3. Petitioners appealed to the Texas court of appeals. While that appeal was pending, petitioners again removed the case to federal court based on the Fifth Circuit's decision in *Neinast*, *supra*, which had held that the Tax Injunction Act did not bar federal jurisdiction over challenges to Texas's parking placard fee. Pet. App. 4; see *Neinast*, 217 F.3d at 277-279.

Petitioners then moved to dismiss the case under Federal Rule of Civil Procedure 12(b)(1) on the sole ground that the suit was barred by Eleventh Amendment immunity. Pet. App. 4. Relying on this Court's decision in *Board of Trustees* v. *Garrett*, 531 U.S. 356 (2001), the district court granted the motion. Pet. App. 36-41, 42-43. The court held that Title II of the ADA was not a proper exercise of Congress's legislative power under Section 5 of the Fourteenth Amendment and thus did not validly abrogate Texas's Eleventh Amendment immunity. *Id.* at 39-40. In so ruling, the court took "issue with the procedural tactics used by the State to achieve this result," *id.* at 40, but concluded that dismissal was compelled "under current Eleventh Amendment jurisprudence," *id.* at 41.

Meyers moved for reconsideration on the ground, *inter alia*, that the claims for declaratory and injunctive relief against state officials in their official capacity should be permitted to go forward under *Ex parte Young*, 209 U.S. 123 (1908). See Pet. App. 34, 45. The district court denied the motion, holding that Title II was unconstitutional in its entirety. *Id.* at 46-47.

4. Meyers appealed, and the United States intervened, pursuant to 28 U.S.C. 2403, to defend the constitutionality of Title II of the ADA's abrogation of Eleventh Amendment immunity.

The court of appeals reversed. Pet. App. 1-35. Based on this Court's intervening decision in *Lapides* v. *Board of Regents*, 535 U.S. 613 (2002), the court of appeals held that petitioners' removal of the case to federal court waived the State's "immunity from suit" under the Eleventh Amendment. Pet. App. 2. The court rejected petitioners' argument that *Lapides* "does not apply to [a] suit based on federal-law claims." *Id.* at 7. The court acknowledged (*id.* at 8-9, 12) that the Court in *Lapides* limited its decision "to the context of state-law claims," because the case "d[id] not present a valid federal claim against the State," 535 U.S. at 617. The court of appeals nevertheless concluded that the principle of waiver recognized in *Lapides* "should apply equally to state and federal claims," Pet. App. 17, because "it [would be] anomalous or inconsistent for a state to both invoke federal jurisdiction and claim immunity from federal suit in the same case," *id.* at 10. The court then concluded that "there is nothing special about the present case or its removal that would justify our taking it out from under the general legal principle requiring waiver." *Id.* at 12.

Having concluded that *Lapides*'s "voluntary invocation principle" for waiving Eleventh Amendment immunity applies to both state-law and federal-law claims, Pet. App. 9-23, the court rejected petitioners' argument that there is "an Eleventh Amendment immunity separate and apart from state sovereign immunity" that would immunize it from suit in federal court, *id.* at 26. The court reasoned that "the states have no other sovereign immunity from suit than that which they brought intact into the union," *ibid.*, and thus found "no support for [petitioners'] theory that state sovereign immunity

is composed of two separate immunities from suit," *id.* at 28.

The court, however, agreed with petitioners that the State enjoyed an additional and distinct immunity that could be asserted in the suit on remand. In the court's view, "a sovereign enjoys two kinds of immunity that it may choose to waive or retain separately—immunity from suit and immunity from liability." Pet. App. 28. In so holding, the court rejected petitioners' argument that the Constitution itself "prescribes a specific rigid structure for each state's sovereign immunity," explaining that such an approach would "conflict[] with the first principles of our federation." *Ibid.* Rather, because each State "retain[s] the individual sovereignty it enjoyed before the union, the structure of the Constitution allows for variation between the nature and structure of each state's immunities from suit and liability," and, indeed, "the patterns of sovereign immunities maintained by the states vary considerably." *Id.* at 28-29.

The Fifth Circuit accordingly held that it "must look to the law of the particular state in determining whether it has established a separate immunity against liability for purposes of waiver." Pet. App. 29. The court concluded that, while petitioners' removal of the case "waived its immunity from suit in federal court," "[w]hether Texas has retained a separate immunity from liability is an issue that must be decided according to that state's law." *Id.* at 32; see *id.* at 35.

5. The court denied petitioners' petition for rehearing and rehearing en banc. Pet. App. 49-51. The court explained that its decision reflected only a "narrow holding" that the voluntary invocation rule recognized in *Lapides* applies to federal-law claims as much as to state-law claims, and thus that removal waived petition-

ers' "unqualified right to object peremptorily" to federal court jurisdiction. *Id.* at 50. The court stressed, however, that such waiver

> does not affect or limit the State's ability to assert whatever rights, immunities or defenses are provided [f]or by its own sovereign immunity law to defeat the claims against the State finally and on their merits in the federal courts.

Ibid. The court concluded that, under its decision, Texas remains free to "assert its state sovereign immunity as defined by its own law as a defense against the plaintiffs' claims in the federal courts." *Ibid.* The court held only that petitioners "may not use [sovereign immunity] to defeat federal jurisdiction or as a return ticket back to the state court system." *Ibid.*

ARGUMENT

The United States agrees with petitioners that a State's removal of a case to federal court waives that State's Eleventh Amendment immunity from suit in a federal court, but does not waive defenses that would have been available to the State in state court, including the constitutional right not to be sued at all. See U.S. Br. at 22, *Lapides* v. *Board of Regents*, 535 U.S. 613 (2002) (No. 01-298). However, this Court's review of that question in this case at this time is not warranted for four reasons. First, the Fifth Circuit's decision is, by its terms, "narrow" (Pet. App. 50), and does not appear to be materially inconsistent with petitioner's position and, in fact, the proceedings on remand may accommodate petitioners' immunity claim. Second and relatedly, the basic immunity issue itself has not been definitively resolved by the lower courts and thus is interlocutory as it comes to this Court. Third, the asserted conflict in the

circuits is neither concrete nor mature. Fourth, there are a number of distinct jurisdictional and jurisprudential barriers that make this case a poor vehicle in which to review the important question that petitioners present.[2]

1. a. In *Lapides* v. *Board of Regents*, 535 U.S. 613 (2002), this Court held that "removal is a form of voluntary invocation of a federal court's jurisdiction sufficient to waive the State's otherwise valid objection to litigation of a matter (here of state law) in a federal forum." *Id.* at 624. The Court limited its decision, however, to "the context of state-law claims, in respect to which the State has explicitly waived immunity from state-court proceedings." *Id.* at 617. The Court expressly reserved the questions whether removal would waive immunity for "a valid federal claim against the State" or for "a situation where the State's underlying sovereign immunity from suit has not been waived or abrogated in state court." *Id.* at 617-618.

Petitioners now seek this Court's review of that latter question—whether the act of removal waives a

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[2] In a letter to this Court dated December 1, 2006, the United States explained that it had intervened in the litigation, pursuant to 28 U.S.C. 2403, solely to defend the constitutionality of Title II's abrogation of Eleventh Amendment immunity, and thus had not previously taken a position on the questions resolved by the court of appeals or presented by the petition. The United States noted, however, that it did take the position in its amicus brief in *Lapides* that a State's removal of a case to federal court effects only a waiver of its immunity from suit in a federal forum, but that the act of removal does not waive defenses that would have been available to the State in state court, including the constitutional right not to be sued at all. That remains the position of the United States. The United States is filing this brief in response to this Court's letter of December 15, 2006, requesting that a response be filed.

State's immunity for federal-law claims where "sovereign immunity has *not* been waived by the State or abrogated by Congress." Pet. i, 6. As the United States explained in its amicus brief (at 22) in *Lapides*, *supra* (No. 01-298), the United States agrees that a State's removal of a case to federal court effects a waiver only of the State's immunity from suit in a federal forum. The act of removal does not waive any other immunity-based defenses that would have been available to the State in state court, including assertion of the constitutional right not to be sued at all on the ground that immunity for the claim has not been waived or abrogated in any forum—state or federal. See *ibid.*

This Court's review of that important question is not warranted in this case, however, because it is not clear that the court of appeals' decision materially diverges from petitioners' position. The bulk of the court of appeals' decision is devoted to establishing that the rule of waiver adopted in *Lapides* (*i.e.*, waiver of forum immunity) applies as much to claims based on federal law as those based on state law. See Pet. App. 5-23. Indeed, the court's decision on rehearing underscored that its "narrow holding" in the case was limited to resolution of that question. *Id.* at 50. In addition, petitioners appear to agree that the *Lapides* waiver rule does not turn upon the source of law—state or federal—on which a plaintiff's claim rests. Instead, the critical distinction on which petitioners rely, and for which they seek this Court's review, is whether the State's immunity from suit for the federal claim has been waived in state court. See, *e.g.*, Pet. i, 6-8, 14-15, 18-20.

b. The court of appeals went on to hold that the federal Constitution does not establish two distinct immunities from suit—one immunity, embodied in the Eleventh

Amendment, from suit in a federal court, and one generalized immunity from suit in any court. Pet. App. 25-26. Petitioners are correct that, at least standing alone, that aspect of the court of appeals' decision is in some tension with the conception of state sovereign immunity implicitly assumed in *Lapides*.

But the immediately ensuing portion of the court of appeals' opinion (see Pet. App. 28-29) suggests that the court held only that petitioners erred in arguing that the federal Constitution itself presupposes and prescribes those dual aspects of state sovereign immunity without regard to state law. See, *e.g.*, *id.* at 29 ("[C]ourts must look to the law of the particular state in determining whether it has established a separate immunity against liability for purposes of waiver."). In that respect, there is force to the court of appeals' decision. Other than the Eleventh Amendment's constraint on the power of *federal* courts, the Constitution does not dictate principles of state sovereign immunity. The Constitution accepts that the States entered the Union "with their sovereignty intact," *Federal Maritime Comm'n* v. *South Carolina State Ports Auth.*, 535 U.S. 743, 751 (2002) (quoting *Blatchford* v. *Native Vill. of Noatak*, 501 U.S. 775, 779 (1991)), but the Constitution does not dictate the content of that preexisting sovereignty nor does it insist that States homogenize their sovereign immunity law. See Pet. App. 29 n.22 (noting the varying forms of sovereign immunity adopted by different States); see also *Northern Ins. Co.* v. *Chatham County*, 126 S. Ct. 1689, 1693 (2006).

It thus appears that the court of appeals took exception not to petitioners' argument that they retain some form of sovereign immunity distinct from the waiver of Eleventh Amendment immunity, but rather to petition-

ers' contention that "the Constitution prescribes a specific rigid structure for each state's sovereign immunity," Pet. App. 28, and thus that federal law itself requires that the State have two distinct immunities from suit. Consistent with that narrow understanding of its decision, the court of appeals went on to hold that petitioners remain free on remand to assert a sovereign immunity from liability under the ADA—contingent only on a determination that state law invests Texas with such additional forms of immunity. *Id.* at 32. Texas law, in fact, appears to track the very distinction between immunity from suit and immunity from liability that the court of appeals adopted in this case.[3] On rehearing, the court stressed again that petitioners remain free to assert on remand "*whatever rights, immunities or defenses* are provided [f]or by its own sovereign immunity." *Id.* at 50.

The court's decision, and in particular its decision on rehearing, thus explicitly leaves it open to petitioners to assert on remand "whatever rights [or] immunities" they retain under state law, including the right not to be sued at all. Pet. App. 50. The court of appeals held only that petitioners may not assert sovereign immunity to "defeat federal jurisdiction." *Ibid.* In other words, the court held that, by removing the case to federal court, petitioners agreed to have their remaining immunity

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[3] See, *e.g.*, *Texas Dep't of Parks & Wildlife* v. *Miranda*, 133 S.W.3d 217, 224 (Tex. 2004) ("Sovereign immunity includes two distinct principles, immunity from suit and immunity from liability."); *Texas Dep't of Transp.* v. *Jones*, 8 S.W.3d 636, 638 (Tex. 1999) ("Immunity from liability and immunity from suit are two distinct principles."); *Federal Sign* v. *Texas S. Univ.*, 951 S.W.2d 401, 405 (Tex. 1997) ("Sovereign immunity embraces two principles: immunity from suit and immunity from liability.").

claims—including the claim that no suit may proceed—resolved by that federal court. That is consistent with *Lapides*. See *Lapides*, 535 U.S. at 620.

Petitioners argue (Pet. 20) that permitting the assertion of a state-law "immunity from liability" on remand is unhelpful because it is "a concept of dubious applicability in this federal-question case in federal court." But petitioners do not explain why a state sovereign "immunity from liability" is any more "dubious" than a state sovereign "immunity from suit." In either case, the ultimate question on remand (for purposes of immunity) will be whether Congress properly abrogated the State's immunity under Section 5 of the Fourteenth Amendment. The answer to that question does not turn on whether the State's asserted immunity is labeled an immunity from suit or an immunity from liability.[4]

In sum, while petitioners disagree with the court of appeals' conceptualization and characterization of its state sovereign immunity, it would be premature to conclude that the court of appeals has prevented petitioners from asserting on remand the very constitutional right not to be sued that they press before this Court. In fact, the court of appeals has expressly invited petitioners to raise on remand "whatever rights, immunities or de-

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[4] That Texas law treats sovereign immunity from liability as an "affirmative defense" is of no moment. See *Miranda*, 133 S.W.3d at 224; *Jones*, 8 S.W.3d at 638; *Federal Sign*, 951 S.W.2d at 405. Eleventh Amendment immunity too is a "defense" that is waived unless affirmatively raised by the State. See *Wisconsin Dep't of Corrs.* v. *Schacht*, 524 U.S. 381, 389 (1998); see *id.* at 394-395 (Kennedy, J., concurring). Indeed, Eleventh Amendment immunity has been described as akin to personal jurisdiction, see *ibid.*, which is also a defense that must be affirmatively raised, see *Hoffman* v. *Blaski*, 363 U.S. 335, 344 (1960). In addition, nothing in the court's decision forecloses an interlocutory appeal from a denial of immunity on remand.

fenses" it retains. Pet. App. 50. Because "this Court reviews judgments, not opinions," *Chevron U.S.A. Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984), and the judgment at issue explicitly permits further examination of petitioners' assertion of sovereign immunity, this Court's intervention at this juncture is not warranted.

2. Relatedly, the decision is interlocutory. This Court generally declines to exercise its certiorari jurisdiction to review interlocutory decisions. See *Hamilton-Brown Shoe Co.* v. *Wolf Bros.*, 240 U.S. 251, 258 (1916); see also *Goldstein* v. *Cox*, 396 U.S. 471, 478 (1970); compare *Virginia Military Inst.* v. *United States*, 508 U.S. 946 (1993) (opinion of Scalia, J., on denial of certiorari, noting the interlocutory posture of the litigation), with *United States* v. *Virginia*, 518 U.S. 515 (1996) (review granted after final judgment).

While this Court permits interlocutory review of a denial of Eleventh Amendment immunity, see *Puerto Rico Aqueduct & Sewer Auth.* v. *Metcalf & Eddy, Inc.*, 506 U.S. 139 (1993), that case involved review of a decision conclusively rejecting the State's claim of immunity, *id.* at 141-142. By contrast, as discussed, the State's assertion of sovereign immunity in this case has not been conclusively resolved and may yet be resolved in petitioners' favor. Accordingly, review by this Court at this juncture is unwarranted under traditional principles counseling against review of interlocutory decisions. Should petitioners' assertion of a sovereign right not to be sued be rejected on remand (and should the other barriers to review outlined below be overcome), then this Court could consider anew whether this Court's review is warranted. Moreover, the Court's decision in that regard may be assisted by further consideration

below of Texas law on the scope of the State's sovereign immunity and the Fifth Circuit's potential application of its decision here in other cases.

3. There is no conflict in the circuits (see Pet. 8-11) that warrants review at this time. To begin with, no court of appeals has addressed the dichotomized approach to state sovereign immunity that the court of appeals adopted here, nor has any court of appeals addressed whether state or federal law controls definition of the elements of state sovereign immunity outside of the Eleventh Amendment context. There thus is no conflict with the court of appeals' substantive approach to the immunity question.

With respect to the question the Fifth Circuit did *not* conclusively resolve—whether petitioners may be sued for federal-law claims for which immunity has not been waived in state court—the Tenth Circuit has held, as petitioners explain (Pet. 10), that the rule of waiver recognized in *Lapides* applies to federal-law claims, even if sovereign immunity has not been waived in state court. See *Estes* v. *Wyoming Dep't of Transp.*, 302 F.3d 1200 (2002).

While the Ninth Circuit's decision in *Embury* v. *King*, 361 F.3d 562 (2004) (see Pet. 10), indicated that a waiver of immunity in state court was not a necessary predicate to application of *Lapides*' waiver rule, the court expressly reserved the question presented here: whether "a removing State defendant remains immunized from federal claims" for which there has been no valid abrogation of Eleventh Amendment immunity (as petitioners contend in this case). 361 F.3d at 566 n.20. In addition, that case involved such a significant delay by the State in asserting its immunity that the district court accused the State of "gamesmanship" for waiting

until the eve of an adverse ruling to invoke immunity. *Id.* at 563-564. The court thus held that, "in the circumstances of this case, allowing the reassertion of Eleventh Amendment immunity, after the State had litigated extensively in federal court but began to anticipate an unfavorable outcome, would waste the time and money of the litigants and the resources of the courts." *Id.* at 566. The court's discussion of *Lapides* thus was unnecessary to its decision.

Petitioners argue (Pet. 9-10) that the court of appeals' decision conflicts with rulings of the Seventh, District of Columbia, and Fourth Circuits. But the Seventh Circuit's decision in *Omosegbon* v. *Wells*, 335 F.3d 668 (2003), reflects a straightforward application of *Lapides*, because the case involved an assertion of immunity for a state-law claim for which the State had waived immunity in its own courts. *Id.* at 673. The Seventh Circuit thus had no occasion to address the question presented here, *i.e.*, whether the waiver rule of *Lapides* would apply to federal-law claims for which immunity had allegedly not been waived or abrogated.

Petitioners' reliance (Pet. 9-10) on a footnote in the D.C. Circuit's decision in *Watters* v. *Washington Metropolitan Area Transit Authority*, 295 F.3d 36 (2002), cert. denied, 538 U.S. 922 (2003), is also inapt. The court held in that case that the plaintiff had failed to assert its waiver argument in a timely manner, and further that, as an interstate compact, the Transit Authority's immunity does not arise solely from the Eleventh Amendment. *Id.* at 42 n.13. While the court noted the "narrow holding of *Lapides*," it declined "to consider, sua sponte, an issue upon which neither this circuit nor the Supreme Court has yet opined." *Ibid.*

Petitioner is correct (Pet. 9) that the Fourth Circuit held that removal does not waive a State's immunity for claims for which there has been no waiver of immunity in state court. See *Stewart* v. *North Carolina*, 393 F.3d 484, 488-489 (2005). That case, however, involved state-law rather than federal-law claims, *id.* at 487, and thus the ruling does not squarely conflict with *Estes*, *supra*, or the court of appeals' "narrow holding" here, which was pointedly limited to federal-law claims, Pet. App. 50. In any event, it remains to be seen on remand whether the court of appeals' decision here reflects a material difference in the law or simply a difference in approach in analyzing immunity claims.

4. There are substantial additional barriers to this Court's review of the question presented in this case. First, petitioners' sovereign immunity argument rests critically on the proposition that, in enacting Title II of the ADA, Congress lacked the constitutional authority under Section 5 of the Fourteenth Amendment to abrogate its immunity from suit. Indeed, petitioners' repeatedly couch their *Lapides* argument in terms of the federal court's jurisdiction over federal-law claims for which immunity has not been waived "or abrogated by Congress." Pet. i; see Pet. 6. The court of appeals, however, did not address whether Title II is a valid abrogation of state sovereign immunity in this context. If, as the United States argued below and in briefs to this Court in *Tennessee* v. *Lane*, 541 U.S. 509 (2004) (No. 02-1667), and *United States* v. *Georgia*, 126 S. Ct. 877 (2006) (No. 04-1203), the abrogation of immunity is valid, resolution of the constitutional question that petitioners

present would be unnecessary to the disposition of this case.[5]

Second, this Court has twice held that, before addressing a State's constitutional immunity to suit under the ADA, courts should first decide whether the plaintiffs have stated a valid claim under the statute. *Georgia*, 126 S. Ct. at 882; *Board of Trustees* v. *Garrett*, 531 U.S. 356, 360 n.1 (2001). Indeed, just last Term, this Court unanimously held that courts confronted with a constitutional challenge to Congress's abrogation of immunity must

> determine in the first instance, on a claim-by-claim basis, (1) which aspects of the State's alleged conduct violated Title II; (2) to what extent such misconduct also violated the Fourteenth Amendment; and (3) insofar as such misconduct violated Title II but did not violate the Fourteenth Amendment, whether Congress's purported abrogation of sovereign immunity as to that class of conduct is nevertheless valid.

Georgia, 126 S. Ct. at 882.

Resolution of the statutory question whether Meyers has stated a claim under Title II is thus a necessary prerequisite not only to deciding the constitutionality of Congress's abrogation, but also to the question that petitioners present here, which presupposes that the abro-

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[5] Petitioners argue (Pet. 6 n.3) that "there are no further proceedings to be had on the abrogation issue" because the district court already held that Title II is not a valid abrogation of immunity. But the district court's decision on that question five years ago, when *Board of Trustees* v. *Garrett*, 531 U.S. 356 (2001), was the most analogous decision from this Court, has been overtaken by the intervening decisions of this Court in *Lane* and *Georgia*, which have upheld the constitutionality of Title II's abrogation in two contexts and have expressly prescribed a new model for analysis of the constitutional question.

gation is *not* valid and which is moot if the abrogation is valid.

As in *Georgia* and *Garrett*, resolution of that statutory question would allow the Court to avoid deciding important questions of constitutional law unnecessarily. "If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that [courts] ought not to pass on questions of constitutionality * * * unless such adjudication is unavoidable." *Spector Motor Serv., Inc.* v. *McLaughlin*, 323 U.S. 101, 105 (1944); see *Lyng* v. *Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 445 (1988) ("A fundamental and longstanding principle of judicial restraint requires that courts avoid reaching constitutional questions in advance of the necessity of deciding them.").

Adherence to established principles of constitutional avoidance is particularly appropriate here. For five years, the United States has taken the consistent position in cases presenting the identical Title II challenge to parking placard fees that the Justice Department interprets its regulation as *not* proscribing the fee charged by Texas here, and thus that Meyers has no valid claim under Title II. That is because parking placards generally are not "required," 28 C.F.R. 35.130(f), to provide nondiscriminatory access to buildings or facilities. Texas already provides such access for drivers with disabilities by offering special license plates at no additional charge, which allow drivers with disabilities, their family members, and non-profit groups that transport individuals with disabilities to utilize the parking spots reserved for persons with disabilities. See Pet. App. 3; Texas Transp. Code Ann. § 504.201 (West 2007). The placard fee here thus can be understood as a fee for

an alternative means of providing access, but not as a surcharge for the program accessibility that is "required" by the Disabilities Act. 28 C.F.R. 35.130(f). The Justice Department's interpretation of its own regulation merits substantial deference, see *Auer* v. *Robbins*, 519 U.S. 452, 461 (1997), and casts such significant doubt on the viability of Meyers' claim on the merits as to eliminate any sound basis for prematurely resolving the important constitutional question presented.

Notably, this Court has repeatedly denied review in other cases where States have asserted an immunity defense to challenges to parking placard fees. See *Thompson* v. *Colorado*, 535 U.S. 1077 (2002); *Brown* v. *North Carolina Div. of Motor Vehicles*, 531 U.S. 1190 (2001); *California Dep't of Motor Vehicles* v. *Dare*, 531 U.S. 1190 (2001); cf. *Klinger* v. *Director, Mo. Dep't of Revenue*, 545 U.S. 1111 (2005) (vacating and remanding decision that addressed the constitutionality of Title II without resolving the statutory construction question).

Third, this case presents a potential statutory bar to federal jurisdiction. The Tax Injunction Act, 28 U.S.C. 1341, denies federal courts jurisdiction over actions to "enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State." The Act is a "'jurisdictional rule' and a 'broad jurisdictional barrier'" to federal court review. *Arkansas* v. *Farm Credit Servs.*, 520 U.S. 821, 835 (1997) (quoting *Moe* v. *Confederated Salish & Kootenai Tribes*, 425 U.S. 463, 470 (1976)). The statute was designed "to limit drastically federal district court jurisdiction to interfere with so important a local concern as the collection of taxes." *Rosewell* v. *LaSalle Nat'l Bank*, 450 U.S. 503, 522 (1981).

When petitioners first removed this case to federal court, the district court remanded the case to state court on the ground that the placard fee was a tax and that the Tax Injunction Act thus barred district court jurisdiction. Pet. App. 37. The Fifth Circuit subsequently held that Texas's parking placard fee was not a tax within the meaning of the Tax Injunction Act. See *Neinast* v. *Texas*, 217 F.3d 275, 277-279 (5th Cir. 2000), cert. denied, 531 U.S. 1190 (2001). In so holding, however, the court of appeals acknowledged that the criteria for identifying a tax under the Act pointed in opposite directions in this case. *Id.* at 278. The court nevertheless concluded that, on balance, the fee does not constitute a tax because it is a user fee designed to recoup the costs of the placard program. *Ibid.*

The courts of appeals have issued conflicting decisions on whether parking placard fees are taxes for purposes of the Tax Injunction Act. Compare *Neinast*, *supra*; *Marcus* v. *Kansas Dep't of Revenue*, 170 F.3d 1305, 1309-1312 (10th Cir. 1999), with *Hedgepeth* v. *Tennessee*, 215 F.3d 608, 611-616 (6th Cir. 2000) (Tax Injunction Act bars challenge to parking placard fee under the ADA); see *id.* at 616 (Moore, J., dissenting) (noting the different analytical approaches courts have taken, with some courts emphasizing where the funds go, while other emphasize "what the purpose or use of the assessment truly is") (quoting *Hexom* v. *Oregon Dep't of Transp.*, 177 F.3d 1134, 1138 (9th Cir. 1999)).

This Court has not yet addressed the definition of "tax" under the Tax Injunction Act, but the Court has held that its terms "should be interpreted to advance its purpose of confin[ing] federal-court intervention in state government." *Jefferson County* v. *Acker*, 527 U.S. 423, 433 (1999) (quoting *Farm Credit Servs.*, 520 U.S. at 826-

827). Furthermore, the Court has recognized that taxes can take the form of user fees imposed to recoup the costs of a governmental program. See *Massachusetts* v. *United States*, 435 U.S. 444, 446 (1978); *id.* at 460-463 (opinion of Brennan, J.). Thus, the question of whether the Tax Injunction Act bars this litigation is a substantial one.

The United States takes no position on that question here, other than to note that the Tax Injunction Act's potential statutory barrier to jurisdiction would have to be resolved before the Court could consider petitioners' constitutional challenge to jurisdiction. See *Vermont Agency of Natural Res.* v. *United States ex rel. Stevens*, 529 U.S. 765, 779-780 (2000) (statutory jurisdictional question must be resolved before Eleventh Amendment question); see also *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 97 & n.2 (1998). The existence of that non-constitutional jurisdictional question provides an additional reason why this case is a poor vehicle to address the important constitutional question that petitioners ask the Court to resolve.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 06-462

In the Supreme Court of the United States

STATE OF TEXAS, *ET AL.*,
Petitioners,

v.

MARJORIE MEYERS, *ET AL.*,
Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

PETITIONERS' REPLY

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PETITIONERS' REPLY

The United States concedes that the question presented is "important," U.S. Br. Opp. 11, 23—an admission reinforced by the fact that 28 States and Puerto Rico have urged the Court to grant the petition, Virginia Br. 2-3. The United States also agrees that the State's position is correct on the merits. U.S. Br. Opp. 9, 11. Nevertheless, the United States and Meyers oppose certiorari primarily based on their strained attempts to reconcile the court of appeals's opinion with the State's position. But the court of appeals's instruction that a removing State still can assert any state-law immunity from *liability* does not preserve the right that the State seeks to vindicate here: the constitutional right not to be sued at all. In response to the uncertainty engendered by the conflicting circuit rules on this issue, Meyers suggests that States can avoid putting their immunity at risk simply by forgoing their statutory right to removal. Meyers Br. Opp. 14. That "modest proposal" only underscores the urgent need for the Court's review.

ARGUMENT

I. THE COURT OF APPEALS'S INSTRUCTION THAT THE STATE MAY ASSERT A STATE-LAW IMMUNITY FROM *LIABILITY* ON REMAND DOES NOT ACCOMMODATE THE STATE'S CONSTITUTIONAL RIGHT *NOT TO BE SUED AT ALL*.

As explained in the petition, Pet. 18-19, the State's argument on immunity-waiver by removal is identical to that asserted by the United States in *Lapides*: a State's removal of a case waives only its "forum immunity"—*i.e.*, "the State consents to have a federal court rather than the state court decide the case"; but removal does not "waive any defenses that would have been available to the State in state court," including "the constitutional right *not to be sued at all*," Brief for the United States as Amicus Curiae at 22, *Lapides* v. *Bd. of Regents of the Univ. Sys. of Ga.*, 535 U.S. 613 (2002) (No. 01-298), 2001 WL 1673411, at *22 (emphasis added). The United States reaffirms that position in its response. U.S. Br. Opp. 10 n.2.

The court of appeals rejected that position, holding that the State's removal of this case "waived its immunity from suit" on Meyers's ADA claim. Pet. App. 32. Still, the United States contends that the court of appeals's decision "may accommodate [the State's] immunity claim" because it permits the State "on remand to assert a sovereign immunity from *liability* under the ADA." U.S. Br. Opp. 9, 13 (emphasis added); *see also* Meyers Br. Opp. 4, 12. The United States thus equates "the constitutional right not to be sued at all"—a right that the United States and the State agree survives removal—with the "immunity from liability" that the court of appeals would allow the State to raise on remand. U.S. Br. Opp. 14 (arguing that, in light of the court of appeals's remand to consider the State's immunity from liability, "it would be premature to conclude that the court of appeals has prevented petitioners from asserting on remand the very constitutional right not to be sued that they press before this Court").

But the "right not to be sued at all" and "immunity from liability" are materially distinct, as the Court has long recognized. *See, e.g.*, *Fed. Mar. Comm'n* v. *S.C. State Ports Auth.*, 535 U.S. 743, 766 (2002); *Leatherman* v. *Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 166 (1993); *P.R. Aqueduct & Sewer Auth.* v. *Metcalf & Eddy, Inc.*, 506 U.S. 139, 145-46 (1993). And the differences between those immunities have important practical consequences for defendant States.

Because immunity from suit, unlike immunity from liability, protects the defendant from the "burdens of litigation," *Mitchell* v. *Forsyth*, 472 U.S. 511, 526 (1985), the Court has repeatedly directed that a defendant's immunity from suit be resolved "at the earliest possible stage in litigation," *Hunter* v. *Bryant*, 502 U.S. 224, 227 (1991) (*per curiam*); *see also P.R. Aqueduct*, 506 U.S., at 145 (noting that benefit of sovereign immunity from suit would otherwise be mostly lost "as litigation proceeds past motion practice"). For the same reason, an adverse decision on immunity

from suit is immediately appealable under the collateral-order doctrine, whereas an adverse decision on immunity from liability is not. *P.R. Aqueduct*, 506 U.S., at 145.[1] Sovereign immunity from suit also "can be raised at any stage of the proceedings," *Calderon* v. *Ashmus*, 523 U.S. 740, 745 n.2 (1998), while state-law immunity from liability is an affirmative defense that is waived if the State does not initially plead it, *see, e.g.*, *Kinnear* v. *Tex. Comm'n on Human Rights*, 14 S.W.3d 299, 300 (Tex. 2000) (*per curiam*).[2] Finally, a State's immunity from suit and from liability are not always coterminous. For example, under Texas law, the State has immunity from suit, but not from liability, for contract claims. *Gen. Servs. Comm'n* v. *Little-Tex. Insulation Co.*, 39 S.W.3d 591, 594 (Tex. 2001). Thus, under the court of appeals's decision, the State would be immune from suit on a contract claim in a case originally filed in federal or state court, but, incongruously, it would have no immunity whatsoever against the same claim in a removed case.

In sum, because immunity from suit and immunity from liability are materially distinct defenses, the court of appeals's judgment that the State's removal of this case waived the former but not the latter does in fact deprive the State of a defense "that would have been

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1. The United States is thus incorrect in asserting that "nothing in the court's decision forecloses an interlocutory appeal from a denial of immunity on remand." U.S. Br. Opp. 14 n.4.

2. The United States suggests this distinction is "of no moment" based on its incorrect analogy between Eleventh Amendment immunity from suit and a waivable affirmative defense. U.S. Br. Opp. 14 n.4. Although it is the State's burden to advance Eleventh Amendment immunity because the Court need not raise it *sua sponte*, *Wisc. Dep't of Corrs.* v. *Schacht*, 524 U.S. 381, 389 (1998), a State may do so for the first time in the court of appeals or this Court, *Edelman* v. *Jordan*, 415 U.S. 651, 677-78 (1974), which is not true of affirmative defenses, *see* FED. R. CIV. P. 8(c).

available to the State in state court"—"the constitutional right not to be sued at all." Brief for the United States at 22, *Lapides*, 535 U.S. 613 (2002) (No. 01-298). The United States' and Meyers's suggestions to the contrary are incorrect and thus do not provide a basis for the Court to deny the petition.

II. THE COURT PERMITS INTERLOCUTORY REVIEW OF DENIALS OF SOVEREIGN IMMUNITY FROM SUIT.

Both Meyers and the United States urge the Court to deny review for the additional reason that the court of appeals's decision is interlocutory. Meyers Br. Opp. 5; U.S. Br. Opp. 15. But as the United States concedes, U.S. Br. Opp. 15, the Court routinely permits certiorari review of interlocutory judgments denying sovereign immunity from suit. *See, e.g.*, *Cent. Va. Cmty. Coll.* v. *Katz*, 546 U.S. 356 (2006); *Tennessee* v. *Lane*, 541 U.S. 509 (2004); *Nev. Dep't of Human Res.* v. *Hibbs*, 538 U.S. 721 (2003); *Bd. of Trs. of the Univ. of Ala.* v. *Garrett*, 531 U.S. 356 (2001); *Fla. Prepaid Postsecondary Educ. Expense Bd.* v. *Coll. Sav. Bank*, 527 U.S. 627 (1999); *Idaho* v. *Coeur d'Alene Tribe of Id.*, 521 U.S. 261 (1997). The court of appeals's judgment that the State "waived its immunity from suit" by removing the case, Pet. App. 34, fits squarely within that precedent.

The United States' sole rejoinder on this point is that the State's immunity "has not been conclusively resolved" because the court of appeals's remand instructions permit the State to assert a state-law immunity from liability. U.S. Br. Opp. 15. As discussed previously, however, any such immunity is fundamentally distinct from the State's "constitutional right not to be sued at all." *See supra* Part I. That immunity from suit *has* been conclusively resolved, Pet. App. 34, and, consistent with the Court's immunity jurisprudence, presents an issue ripe for certiorari review.

III. THERE IS A CLEAR CONFLICT AMONG THE CIRCUITS REGARDING WHETHER REMOVAL WAIVES ANY IMMUNITY FROM SUIT THAT THE STATE COULD HAVE ASSERTED IN STATE COURT.

Meyers and the United States endeavor to muddle the circuit conflict presented in the petition by pointing out that some of the decisions involve federal claims while others involve state-law claims, and that other circuits have not addressed the court of appeals's holding that state-law immunity from liability survives removal. Meyers Br. Opp. 6-10; U.S. Br. Opp. 16-18. Those distinctions are immaterial to the question presented. The relevant issue is whether a State's removal of a case to federal court precludes it from asserting an immunity *from suit* that it could have asserted in state court—regardless of whether the plaintiff's claim is state or federal or whether the State retains the qualitatively different defense of immunity from liability after removal. As to that question, the circuits are assuredly in conflict.

In this case, the court of appeals held that "Texas waived its immunity from suit by removal of this case to federal court." Pet. App. 34. As the United States notes, the court of appeals explained that this rule "applies as much to claims based on federal law as those based on state law." U.S. Br. Opp. 11; *see also* Pet. App. 9 (holding that "the waiver-by-removal rule applies generally to any private suit which a state removes to federal court"). The court of appeals further held that this rule "applies generally in all cases for the sake of consistency" regardless of whether the State had immunity from suit in state court. Pet. App. 22-23 (finding it irrelevant whether State's removal was attempt to regain immunity that it had waived in state court). The court of appeals thus concluded that, because "Texas waived its immunity from suit by removal of this case," the State's argument that Title II of the ADA did not validly abrogate its immunity *from suit* was moot. Pet. App. 33 ("Thus, we need not reach or decide whether the district court

erred in finding that Congress did not validly abrogate Texas's immunity from suit by ADA Title II.").

As the court of appeals recognized, its decision aligns with that of the Tenth Circuit in *Estes* v. *Wyoming Department of Transportation*, 302 F.3d 1200 (CA10 2002). Pet. App. 18. In *Estes*, the State removed an ADA Title I claim from state to federal court and then moved to dismiss that claim based on its sovereign immunity from suit. 302 F.3d, at 1202. The district court held that ADA Title I validly abrogated the State's immunity from suit. *Id.* The State filed an interlocutory appeal. *Id.* The Tenth Circuit acknowledged that, after the district court had rendered its decision, this Court held that ADA Title I did *not* validly abrogate States' immunity from suit, and thus *that* basis for the district court's denial of immunity from suit was incorrect. *Id.*, at 1203 (citing *Garrett*, 531 U.S., at 374 n.9). Nevertheless, the Tenth Circuit concluded that, under *Lapides*, the State's removal of the case to federal court *did* waive its immunity from suit for the ADA claim. *Id.*, at 1204. In sum, as in this case, the Tenth Circuit held that the act of removal precluded the State from asserting immunity from suit even though it could have done so in state court.

By contrast, the Fourth Circuit has held that a State can remove a case to federal court and still raise any immunity from suit that it could have asserted in state court. *Stewart* v. *North Carolina*, 393 F.3d 484, 488-90 (CA4 2005). In *Stewart*, the Fourth Circuit held that, after removing the case, North Carolina still was entitled to assert any immunity from suit it possessed in state court to obtain dismissal of claims in federal court. 393 F.3d, at 490 (observing that "North Carolina merely sought to have the sovereign immunity issue resolved by a federal court rather than a state court"). Although only state-law claims were at issue in *Stewart*, nothing in the decision limits its holding to such claims. *Id.* ("We therefore hold that North Carolina, having not already consented to suit in its own courts, did not waive sovereign immunity by voluntarily

removing the action to federal court for resolution of the immunity question."); *see also Cockfield* v. *S.C. Dep't of Pub. Safety*, No. 4:05-277, 2007 WL 954131, at *15 (D.S.C. Mar. 27, 2007) (applying *Stewart* to find immunity from suit on federal §1981 claim in removed case).[3]

Similarly, the Seventh Circuit has held that removal leaves a State's sovereign immunity from suit intact. *Omosegbon* v. *Wells*, 335 F.3d 668, 673 (CA7 2003). In that case, the court determined that *Lapides*'s waiver-by-removal rule applied only to bar a State's objection to litigating "in a federal forum." *Id.* That limitation in *Lapides* interposed an "extra layer to our sovereign immunity analysis": determining whether the State could have asserted an immunity from suit in state court. *Id.* (holding that "we must first satisfy ourselves that Indiana's state-law immunity rules would have allowed an Indiana court to hear Dele's state-law contract claim had this lawsuit not been removed to federal court"). That "extra layer" is absent from the Fifth and Tenth Circuits' analyses because those courts hold that removal waives not only the State's objection to litigating in federal court, but also the State's immunity from suit, and thus, the existence of any immunity from suit in state court is irrelevant. Pet. App. 22-23, 33; *Estes*, 302 F.3d, at 1204.

This conflict requires no further percolation. A State either can assert immunity from suit after removal or it cannot. The decisions discussed above have thoroughly explored this binary question. The added value of other circuits lining up on either side of this

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3. For that reason, Meyers is incorrect that the court of appeals's express disagreement with *Stewart* was limited to "semantics and nuances." Meyers Br. Opp. 8. On the key issue of whether a State can assert immunity from suit after removal, the court of appeals found the existence of immunity from suit in state court to be irrelevant, Pet. App. 22-23, whereas the Fourth Circuit found it dispositive, 393 F.3d, at 490.

debate—if any—is significantly outweighed by the detriment to jurists and litigants that persists while this issue remains unresolved. District courts continue to struggle with the conflicting directives on this important question. *See, e.g.*, *Crawford* v. *Lexington-Fayette Urban County Gov't*, No. 06-299-JBC, 2007 WL 101862, at *4-*6 (E.D. Ky. Jan. 10, 2007) (rejecting *Meyers* and following *Stewart*); *Boone* v. *Pa. Office of Vocational Rehab.*, 373 F. Supp. 2d 484, 492-94 (M.D. Pa. 2005) (cataloguing the divergent circuit decisions and following *Stewart*). Meanwhile, most States are unfairly burdened by either a conditional access to federal courts or, in circuits that have not addressed this issue, an inability to make informed decisions about removal. Virginia Br. 3-4.

IV. THERE ARE NO JURISDICTIONAL OR JURISPRUDENTIAL BARRIERS TO REVIEW OF THE QUESTION PRESENTED.

The United States incorrectly surmises that, to reach the question presented, the Court must first resolve the constitutional issue of whether Title II of the ADA validly abrogates the State's immunity from suit as applied to this case, and thus, under the constitutional-avoidance doctrine, the Court must also decide the antecedent statutory questions of whether Meyers's suit states a claim under Title II and whether the Tax Injunction Act bars federal jurisdiction. U.S. Br. Opp. 18-23. But that is not the case.

Although the United States correctly observes that the State's phrasing of the issue at times appears to presuppose that the Title II abrogation is not valid, U.S. Br. Opp. 18, 19-20, the State does not suggest that a court must decide the constitutional question of abrogation *before* application of the waiver-by-removal rule. Indeed, under the constitutional-avoidance doctrine, it should not do so. Rather, the State is arguing only that, after removal of a case, it still should be able to *assert* any immunity from suit—not merely liability—that it might have asserted in state court. Pet. 6 (phrasing question presented as "whether the waiver-by-removal

rule applies to claims for which the State *contends* that its sovereign immunity from suit has neither been waived nor validly abrogated" (emphasis added)). The court of appeals held that the State could not do this, ruling that the act of removal alone waived any immunity from suit that the State might have asserted, and that it thus was unnecessary to address the State's argument that Title II of the ADA did not validly abrogate its immunity from suit. Pet. App. 33. By contrast, the Fourth Circuit held in *Stewart* that a State could remove a case to have the issue of immunity from suit "resolved by a federal court rather than a state court." 393 F.3d, at 490. *That* is the essential conflict for which the State seeks review.

Stated differently, the State simply seeks an extension of *Lapides* to all cases. Removal should "waive the State's otherwise valid objection to litigation of a matter . . . in a federal forum." 535 U.S., at 624. But to the extent that a State possesses or lacks immunity from suit for a claim in the case, that status should remain unchanged upon removal. Accordingly, the defendant States in *Lapides* and *Omosegbon* could not regain the immunity from suit that they indisputably did not have in state court. But if a defendant State would have been entitled to assert an immunity from suit in state court—as in this case, *Estes*, and *Stewart*—it should be able to raise that same immunity from suit in federal court, obtain an early ruling on that immunity via a motion to dismiss, and bring an interlocutory appeal if the ruling is adverse. *See* Pet. 22.

Resolution of this issue thus does not require the Court to resolve the constitutional question of abrogation under Title II of the ADA, but only to address the scope of the federal common-law voluntary-invocation rule. Indeed, if the State were to prevail on the merits, the appropriate relief would be for the Court to remand the case to the court of appeals to allow *that* court to take up the possible abrogation of the State's immunity from suit—which the district court had resolved in the State's favor, Pet. App. 40, and Meyers had raised on appeal, *id.*, at 4. For that reason, the

constitutional question of abrogation, and the statutory issues antecedent to that question, are not barriers to certiorari review.

As another purported vehicle problem, Meyers incorrectly avers that the Court would have to resolve whether the State's immunity from suit was subject to a state-law exception allowing suits to recover illegally collected fees. Meyers Br. Opp. 11. Again, however, the Court does not have to resolve whether the State *has* immunity from suit; rather, the relevant question is whether the State can *assert* immunity from suit following removal. In any event, Meyers's argument fails because the claimed exception waives the State's immunity only from *state-law* actions to recover illegal taxes and fees, *see Shaw* v. *Phillips Crane & Rigging of San Antonio, Inc.*, 636 S.W.2d 186, 188 (Tex. 1982), whereas Meyers's suit contains only a federal ADA claim, Pet. App. 37.

Finally, Meyers wrongly contends that the Court would have to confront "a significant question involving the district court's removal jurisdiction": whether the court of appeals properly allowed removal after the initial thirty-day period based on a subsequent decision in a separate but related case. Meyers Br. Opp. 12-13. It is well settled that timeliness of removal is a procedural defect, not a jurisdictional one, and thus may be waived. *See Grubbs* v. *Gen. Elec. Credit Corp.*, 405 U.S. 699, 702-03 (1972); *Ariel Land Owners, Inc.* v. *Dring*, 351 F.3d 611, 614 (CA3 2003). Meyers waived this issue by not raising it in the court of appeals. *See generally* Meyers C.A. Br. And, in this posture, the only relevant question as to removal jurisdiction is whether the district court would have had original jurisdiction over the case. *Grubbs*, 405 U.S., at 702. Because this is an ADA claim, that is undisputed.

CONCLUSION

The Court should grant the petition for writ of certiorari.

Respectfully submitted.

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No. 06-462

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In The
Supreme Court of the United States

STATE OF TEXAS, the TEXAS DEPARTMENT OF TRANSPORTATION, and MICHAEL W. BEHRENS, in his official capacity as Executive Director of the Texas Department of Transportation,

Petitioners,

v.

MARJORIE MEYERS by her next friend EDGAR C. BENZING, HELEN ELKIN, RUTH H. DAVIS, and PHILLIP GREENBERG, on behalf of themselves and all others similarly situated, and the UNITED STATES OF AMERICA,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF THE COMMONWEALTH OF VIRGINIA, 27 OTHER STATES, AND PUERTO RICO AS AMICI CURIAE IN SUPPORT OF THE PETITIONERS

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QUESTION PRESENTED

When a State removes a case from state court to federal court, does it waive its sovereign immunity for all claims against it?

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INTEREST OF AMICI

The States' interest is clear – "[a]n integral component of that 'residuary and inviolable sovereignty' retained by the States is their immunity from private suits." *Federal Mar. Comm'n v. South Carolina State Ports Auth.*, 535 U.S. 743, 751-52 (2002). *See also THE FEDERALIST No. 39,* at 213 (James Madison) ("[T]he proposed government cannot be deemed a *national* one; since its jurisdiction extends to certain enumerated objects only, and leaves to the several States a residuary and inviolable sovereignty over all other objects."); *THE FEDERALIST No. 81*, at 455 (Alexander Hamilton) ("It is inherent in the nature of sovereignty not to be amenable to the suit of an individual *without its consent.*") (emphasis original). This immunity, which is confirmed by the Eleventh Amendment, U.S. Const. amend. XI, protects the States from suit altogether unless one of the narrow exceptions applies. *See Green v. Mansour,* 474 U.S. 64, 68 (1985). Sovereign immunity does not exist solely in order to "preven[t] federal-court judgments that must be paid out of a State's treasury," *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 48 (1994), but precludes "the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties." *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993) (internal quotation marks omitted). Indeed, sovereign immunity bars suits against the States by Indian Tribes, *Blatchford v. Native Vill. of Noatak,* 501 U.S. 773, 782 (1991), foreign nations, *Principality of Monaco v. Mississippi,* 292 U.S. 313, 330-32 (1934), and corporations created by the National Government, *Smith v. Reeves*, 178 U.S. 436, 446, 449 (1900). Moreover, it applies to proceedings in state court, *Alden v. Maine*, 527 U.S. 706, 712 (1999), federal administrative

proceedings, *Federal Mar. Comm'n*, 535 U.S. at 760, in admiralty, *In re New York*, 256 U.S. 490, 503 (1921), and in situations where the State's treasury is not implicated. *See Regents of the Univ. of California v. Doe*, 519 U.S. 425, 431 (1997). Thus, the States have an interest in this Court's review of any decision that undermines "the sovereign immunity enjoyed by States as part of our constitutional framework." *Federal Mar. Comm'n*, 535 U.S. at 753.

REASONS FOR GRANTING THE WRIT

Certiorari should be granted for three reasons. First, the States need guidance from this Court and resolution of a conflict among the Circuits. The States need guidance on the effects of invoking the jurisdiction of the federal courts. If, as the Fifth Circuit found, removal results an absolute waiver of the State's sovereign immunity from suit, then there will be enormous practical consequences. The States also need this Court to resolve a deep and mature conflict among the Circuits. If the States are to make informed decisions regarding removal, there must be uniform national rule.

Second, the lower court's decision contradicts this Court's pronouncements concerning the effect of a State invoking the jurisdiction of a federal court. As this Court's decisions suggest, when a State invokes the jurisdiction of a federal court, it does not waive sovereign immunity for all claims, but merely diminishes sovereign immunity to a limited degree. A State's decision to remove to federal court results in the loss of its "forum immunity" for federal courts. The State's sovereign immunity is neither greater

nor lesser than it would be if the State had chosen to remain in state court.

Third, the court of appeals' decision contradicts this Court's jurisprudence. This Court's decisions mandate that the exceptions to sovereign immunity, particularly the waiver exception, be construed narrowly. The Fifth Circuit's broad absolute approach cannot be squared with this Court's precedents. Additionally, the clear statement principle applies any time Congress attempts to regulate the States' sovereignty. Nevertheless, the lower court effectively held that a statute, which makes no mention of sovereign immunity, requires the States to shed the entirety of their sovereign immunity as a condition of vindicating their interests in federal court.

I. THE STATES NEED GUIDANCE FROM THIS COURT AND RESOLUTION OF A CONFLICT AMONG THE CIRCUITS.

The States need guidance from this Court on the effects of invoking the jurisdiction of the federal courts. According to the Fifth Circuit, a State's removal of an action from state court to federal court resulted in an absolute waiver of the State's sovereign immunity from suit. If this is correct, then the States are treated far worse than non-sovereign parties. The States must surrender their immunity as the price of litigating in federal courts, but non-sovereigns forfeit nothing. Of course, from a practical standpoint, the lower court's rule will discourage States from utilizing federal courts to resolve federal questions. Similarly, because all defendants must consent to removal, *Chicago, R.I. & P. Ry. Co. v. Martin*, 178 U.S. 245, 248 (1900), the States will be reluctant to consent to a non-sovereign co-defendant's desire to remove. In many

instances, these non-sovereign co-defendants will be the State's own employees who are sued in their personal capacities and who may have a right of indemnification under state law. This Court needs to address whether the Fifth Circuit's draconian rule of absolute waiver is the constitutional norm.

Moreover, the States need to have this Court resolve a deep and mature conflict among the Circuits concerning an issue that has enormous consequences for the States. In the Fourth, Seventh, and District of Columbia Circuits, States that remove an action to federal court only diminish their sovereign immunity to the extent that sovereign immunity has been waived in state court. *See Stewart v. North Carolina*, 393 F.3d 484, 488-90 (4th Cir. 2005); *Omosegbon v. Wells*, 335 F.3d 668, 673 (7th Cir. 2003); *Watters v. Washington Metro. Area Transit Auth.*, 295 F.3d 36, 42 n.13 (D.C. Cir. 2002). In sharp contrast, in the Fifth, Ninth, and Tenth Circuits, States that remove an action to federal court waive sovereign immunity for all claims. *See Meyers ex rel. Benzing v. Texas*, 410 F.3d 236, 242-50 (5th Cir. 2005); *Embury v. King*, 361 F.3d 562, 564 (9th Cir. 2004); *Estes v. Wyoming Dep't of Transp.*, 302 F.3d 1200, 1203-06 (10th Cir. 2002). Consequently, States that are sued in the Fourth, Seventh, and District of Columbia Circuits are treated differently and more favorably than States that are sued in the Fifth, Ninth, and Tenth Circuits. Moreover, States that are sued in the First, Second, Third, Sixth, Eighth, or Eleventh Circuits have no idea whether removal has the effect of merely diminishing sovereign immunity to the level that existed in state court or absolutely waiving sovereign immunity for all claims. For the States to make informed decisions regarding removal, it is essential that this Court resolve the conflict among the Circuits.

II. WHEN A STATE INVOKES THE JURISDICTION OF A FEDERAL COURT, IT DOES NOT WAIVE SOVEREIGN IMMUNITY, BUT MERELY DIMINISHES IT.

On occasion, this Court has described a State's decision to invoke federal court jurisdiction as a "waiver" of sovereign immunity. *See Gardner v. New Jersey,* 329 U.S. 565, 573-74 (1947) (When a State files a proof of claim in a bankruptcy proceeding, the State "waives any immunity . . . respecting the adjudication of the claim."). The use of the term "waiver" can be misleading. Sovereign immunity is immunity from suit by another party. As such, it does not come into play when the State invokes the jurisdiction of a federal court. To the contrary, the initiation of litigation or removal of a case to federal court involves a wholly separate power – the voluntary right of a State to invoke the jurisdiction of a federal court to protect the States' legal interests. Karen Cordry, *Seminole Seven Years On, in* ANNUAL SURVEY OF BANKRUPTCY LAW 2002-03 383, 455 (William L. Norton ed., 2003); Dan Schweitzer, *Lapides v. Board of Regents of the University of Georgia System: A Partial Answer to the Sovereign Immunity-Waiver Conundrum,* 17 Nat'l Envir. L.J. 3 (Dec. 2002/Jan. 2003).

Therefore, a State's decision to invoke federal court jurisdiction is properly characterized as a "diminishment" of sovereign immunity. This Court's decisions implicitly demonstrate the point. When a sovereign entity initiates suit in federal court, it exposes itself to the equivalent of a compulsory counterclaim that does not exceed in amount or differ in kind from the relief sought by the State. *See Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian*

Tribe, 498 U.S. 505, 509 (1991);[1] *United States v. United States Fid. & Guar. Co.,* 309 U.S. 506, 511-12 (1940); *United States v. Shaw,* 309 U.S. 495, 501-02 (1940).[2] Thus, if the sovereign entity seeks injunctive relief, sovereign immunity bars a counterclaim or cross-claim for damages. *Potawatomi Indian Tribe*, 498 U.S. at 509; *United States Fid. & Guar. Co.*, 309 U.S. at 513. If a sovereign seeks monetary damages, any counterclaim seeking an amount of damages greater than the amount originally sought by the sovereign, even with respect to a mandatory counterclaim, is barred by sovereign immunity. *Shaw*, 309 U.S. at 501. In other words, the initiation of litigation does not result in an absolute waiver of sovereign immunity. *See Potawatomi Tribe*, 498 U.S. at 509.

Similarly, if a State invokes the jurisdiction of a federal bankruptcy court by filing a proof of claim, sovereign immunity is not waived, but merely diminished.[3]

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[1] While *Potawatomi Indian Tribe* involved a suit initiated by an Indian Tribe rather than a State, the same principles apply to the States. *See Kiowa Tribe of Oklahoma v. Mfg. Techs., Inc.*, 523 U.S. 751, 756 (1998) (tribal immunity akin to that of other governments until abrogated).

[2] Although *United States Fid. & Guar. Co.* and *Shaw* involved suits initiated by the National Government rather than a State, "it cannot be doubted that the question whether a . . . suit is one against the State . . . must depend upon the same principles that determine whether a . . . suit is one against the United States." *Tindal v. Wesley*, 167 U.S. 204, 213 (1897). *See also California v. Deep Sea Research, Inc.*, 523 U.S. 491, 506-07 (1998) ("In considering whether the Eleventh Amendment applies . . . , this Court's decisions in cases involving the sovereign immunity of the Federal Government . . . provide guidance, for this Court has recognized a correlation between sovereign immunity principles applicable to States and the Federal Government.").

[3] Indeed, two Circuits interpreting the Bankruptcy Act, the predecessor to the current Bankruptcy Code, held that any "waiver" resulting from a proof of claim was limited to the amount of the proof of claim. *See Jones v. Yorke (In re Friendship Med. Ctr., Ltd.)*, 710 F.2d

(Continued on following page)

"When the State becomes the actor and files a claim against the fund it waives any *immunity which it otherwise might have had respecting the adjudication of the claim.*" *Gardner*, 329 U.S. at 574 (emphasis added). Put another way, "if a state files a proof of claim, it waives immunity from any actions that are the equivalent of a compulsory counterclaim." Adam Feibelman, *Federal Bankruptcy Law and State Sovereign Immunity*, 81 Tex. L. Rev. 1381, 1401 (2003). In sum, a State's filing of a proof of claim merely allows the adjudication of *that* claim. *Gardner*, 329 U.S. at 574.

Thus, a State's decision to remove a case to federal court cannot be regarded as a waiver of sovereign immunity for all claims. *See Stewart*, 393 F.3d at 488-90. Rather, the act of removal merely diminishes sovereign immunity for "state-law claims, in respect to which the State has explicitly waived immunity from state-court proceedings." *Lapides v. Board of Regents of the University of Georgia System*, 535 U.S. 613, 617 (2002). In other words, a State's decision to remove results in the loss of its "forum immunity" for federal courts. The State's sovereign immunity is neither greater nor lesser than it would be if the State had chosen to remain in state court.

Because the Fifth Circuit held that a State's decision to remove a suit to federal court results in a waiver of sovereign immunity for all claims, it misapprehended this Court's jurisprudence on the effect of a State invoking the jurisdiction of a federal court. That misapprehension and

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1297, 1301 (7th Cir. 1983); *Ohio v. Madeline Marie Nursing Homes Nos. 1 & 2*, 694 F.2d 449, 462 (6th Cir. 1982).

the need for further clarification by this Court warrants review. Certiorari should be granted.

III. THE LOWER COURT'S DECISION CONTRADICTS THIS COURT'S JURISPRUDENCE.

The lower court's decision also contradicts this Court's jurisprudence in two ways. First, the Fifth Circuit's absolute waiver rule is inconsistent with the narrow scope of the exceptions to sovereign immunity. Second, the court of appeals pronouncement that removal equals absolute waiver is inconsistent with the clear statement rule.

A. The Exceptions to Sovereign Immunity Are Narrow.

Although the scope of sovereign immunity is quite broad, *Federal Mar. Comm'n*, 535 U.S. at 760, the scope of the exceptions to sovereign immunity is quite narrow. For example, Congress, exercising its power to enforce the Fourteenth Amendment, U.S. Const. amend. XIV, § 5, may abrogate sovereign immunity for federal statutory claims that involve a constitutional violation. *See United States v. Georgia*, 126 S. Ct. 877, 881 (2006); *Tennessee v. Lane*, 541 U.S. 509, 518 (2004) (both finding abrogation for federal statutory claims that involve a constitutional violation). Yet, when a federal statutory claim does not involve a constitutional violation, abrogation has been rejected. *See generally Board of Trs. of Univ. of Alabama v. Garrett*, 531 U.S. 356, 364 (2001); *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 78 (2000); *Alden*, 527 U.S. at 748; *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank*, 527 U.S. 627, 636 (1999); *Seminole Tribe v. Florida*, 517 U.S. 44, 72-73 (1996) (all holding that the States were immune

from statutory claims that did not involve constitutional violations). *But see Nevada Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 736 (2003) (finding abrogation for a federal statutory claim that did not involve a constitutional violation, but did involve gender discrimination). Similarly, although the doctrine of *Ex parte Young*, 209 U.S. 123 (1908), generally allows federal courts to enjoin state officers, in their official capacities, to conform their conduct to federal law, *Frew v. Hawkins*, 540 U.S. 431, 440 (2004), the doctrine is inapplicable where Congress had enacted a "detailed remedial scheme," *Seminole Tribe*, 517 U.S. at 71-75, or where "special sovereignty interests" are involved. *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261, 287-88 (1997).

More significantly for this Petition, while the States may voluntarily waive sovereign immunity, *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 670 (1999), a waiver of sovereign immunity will be found "only where stated 'by the most expressive language or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction.'" *Edelman v. Jordan*, 415 U.S. 651, 673 (1974) (citation omitted). Indeed, there are no constructive waivers of sovereign immunity. *College Sav. Bank*, 527 U.S. at 681-84. *See also United States v. King*, 395 U.S. 1, 4 (1969) (describing the "settled propositio[n]" that the United States' waiver of sovereign immunity "cannot be implied but must be unequivocally expressed"). Thus, a State does not waive its sovereign immunity in federal court by consenting to suit in its own courts, *Smith*, 178 U.S. at 441-45, stating its intention to "sue and be sued," *Florida Dep't of Health and Rehab. Servs. v. Florida Nursing Home Ass'n*, 450 U.S. 147, 149-50 (1981) (*per*

curiam), or authorizing suits against it "in any court of competent jurisdiction." *Kennecott Copper Corp. v. State Tax Comm'n*, 327 U.S. 573, 577-79 (1946). "Although a State's general waiver of sovereign immunity may subject it to suit in state court, it is not enough to waive the immunity guaranteed by the Eleventh Amendment ... [absent] intention to subject itself to suit in federal court." *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 241 (1985) (citations omitted). Consequently, receipt of federal funds, general participation in a federal program, or an agreement to recognize and abide by federal laws, regulations, and guidelines alone are insufficient to waive sovereign immunity. *See id.* at 246-47.

In sharp contrast to this Court's narrow construction of sovereign immunity exceptions, the lower court adopted a categorical absolutist approach to waiver. Although "a waiver of sovereign immunity is to be strictly construed, in terms of its scope, in favor of the sovereign," *Department of the Army v. Blue Fox, Inc.*, 525 U.S. 255, 261 (1999), the lower court found that the mere act of removal results in the implicit waiver of sovereign immunity for *all* claims. Moreover, the court of appeals rule – that States must sacrifice sovereign immunity if they wish to litigate in federal court – raises serious constitutional difficulties. *See College Savings Bank*, 527 U.S. at 687 ("In any event, we think where the constitutionally guaranteed protection of the States' sovereign immunity is involved, the point of coercion is automatically passed – and the voluntariness of waiver destroyed – when what is attached to the refusal to waive is the exclusion of the State from otherwise lawful activity.").

B. The Lower Court Decision Contradicts the Clear Statement Principle.

The process for removing a case from state court to federal court is governed by 28 U.S.C. § 1446. *See* Charles Alan Wright & Mary Kay Kane, FEDERAL PRACTICE & PROCEDURE: FEDERAL PRACTICE DESKBOOK § 42 (2002). By holding that a State waives sovereign immunity for all claims when it removes a case, the Fifth Circuit effectively held that the 28 U.S.C. § 1446 *requires* the States to surrender their immunity as a condition of choosing to have the case heard in federal court. Such an interpretation of a federal statute contradicts the clear statement principle.

To explain, "if Congress intends to alter the 'usual constitutional balance between the States and the Federal Government,' it must make its intention to do so 'unmistakably clear in the language of the statute.'" *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 65 (1990) (internal quotation marks omitted). "[T]he clear statement principle reflects 'an acknowledgment that the States retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere.'" *Raygor v. Regents of the Univ. of Minnesota*, 534 U.S. 533, 544 (2002). This principle "assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision." *United States v. Bass,* 404 U.S. 336, 349 (1971). If Congress is not clear and unambiguous, there can be no abrogation or waiver of the States' sovereign immunity. *See Dellmuth v. Muth,* 491 U.S. 223, 230-32 (1989) (finding that Congress did not clearly express its intention to abrogate). *See also Vermont Agency of Natural Resources v. United States ex rel. Stevens,* 529 U.S. 765,

787 (2000) (Because Congress did not clearly and unambiguously state that a State was a "person" under the False Claims Act, a *qui tam* relator could not bring suit on behalf of the United States against a State.).

If the clear statement principle is applied to the act of removing a case to federal court, then there is no waiver of sovereign immunity. The removal statute, 28 U.S.C. § 1446, does not mention the Eleventh Amendment, sovereign immunity, or the States. *See Dellmuth*, 491 U.S. at 231 (Federal statute that does mention the Eleventh Amendment or the States' sovereign immunity does not abrogate sovereign immunity). This omission is not surprising. The purpose of the removal statute is not to regulate the States' sovereign immunity, but "to protect federal rights and to provide a forum that could more accurately interpret federal law." *Boys Markets, Inc. v. Retail Clerks Union, Local 770*, 398 U.S. 235, 247 n.13 (1970).

Because the Fifth Circuit gave a broad construction to an exception to sovereign immunity and because it ignored the clear statement principle, the decision below contradicts this Court's decisions. Certiorari should be granted.

CONCLUSION

For the reasons stated above and in the Petition itself, the Petition for Certiorari should be **GRANTED**.

Respectfully submitted,

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